

On Appeal from the Supreme Court of British Columbia

BETWEEN

FRANK VICKER HOBBS,

PLAINTIFF,

AND

THE ESQUIMALT AND NANAIMO RAILWAY COMPANY,

DEFENDANTS (RESPONDENTS).

CASE ON APPEAL

C. C. PEMBERTON;

Appellant's Solicitor.

DAVIE, POOLEY & LUXTON,

Respondents' Solicitors.

GREENWOOD, SMITH & RANDOLPH;
PRINTERS AND BOOKBINDERS, VICTORIA, B. C., 1908.

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IN THE SUPREME COURT OF CANADA

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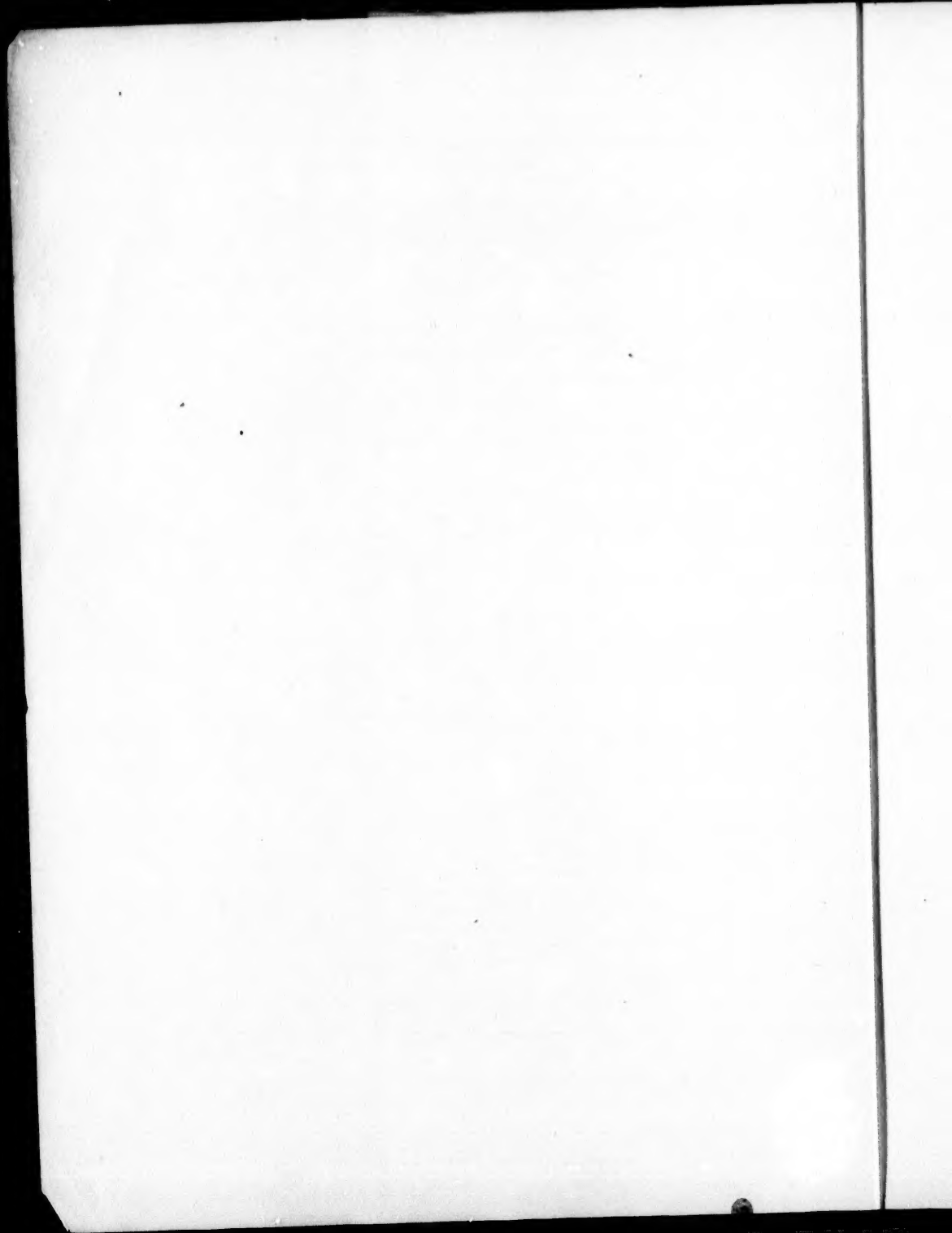
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In the Supreme Court of Canada.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

BETWEEN

10

FRANK VICKER HOBBS,

PLAINTIFF (APPELLANT),

AND

THE ESQUIMALT AND NANAIMO RAILWAY COMPANY,

DEFENDANTS (RESPONDENTS). 20

WRIT ISSUED THE 30TH DAY OF DECEMBER, 1896.

STATEMENT OF CLAIM.

1. The Plaintiff resides at the City of Victoria in the Province of British Columbia, and is a merchant.
2. The Defendant Company is a corporation having its head office at the City of 30 Victoria.
3. By agreement in writing dated the 28th day of November, 1889, the Defendant Company agreed to sell to the Plaintiff the inheritance in fee simple of and in certain lands, tenements and hereditaments, situate in Douglas and Cranberry Districts, Vancouver Island, in the Province of British Columbia. The said agreement is contained in a receipt signed by the Land Commissioner and Agent of the Defendant Company and is in the words and figures following :

"ESQUIMALT & NANAIMO RAILWAY CO. 40

" LAND DEPARTMENT.

" VICTORIA, B. C., November 18th, 1889.

"Received of Frank Vicker Hobbs the sum of one hundred and twenty dollars (\$120.00) being a first payment on account of his purchase from the E. & N. Ry. Company of one hundred and sixty (160) acres of land in Bright District, at the price of three dollars (\$3.00) an acre, commencing at a point about two (2) miles west of Louis Stark's Crown Grant in Cranberry District, thence running west 40 chains to Berkely Creek,

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thence south 40 chains, thence east 40 chains, thence north 40 chains to place of commencement; the balance of purchase money to be paid in equal instalments of seventy-five (75) cents an acre at the expiration of one, two and three years from date, with interest at the rate of six per cent. per annum.

(Sgd) "JOHN TRUTCH,

"Land Commr."

The said lands, tenements and hereditaments form part of Lot 6, Douglas District, and of Lots 10 and 11, Range 1, Cranberry District aforesaid, as shewn on the Official Map or Plan of said district and more particularly described as follows: 10

Commencing at a post 20 chains due north, 3 chains due west of the northeast corner post of Lot 3, Douglas District, thence due east 40 chains, thence due north 40 chains, thence due west 40 chains, thence due south 40 chains and 23 links more or less to place of commencement, containing by admeasurement 160 acres more or less.

4. The Esquimalt & Nanaimo Railway Company as described in the said agreement of the 28th day of November, 1889, is the Defendant Company.

5. The Plaintiff duly paid the Defendant Company the said sum of \$120, being 20 the first payment mentioned in the said agreement of the 28th day of November, 1889.

6. The agreement so entered into has been part performed, as follows: Shortly after the same was entered into the Plaintiff entered into possession of the said land and built a house and made certain other improvements thereon, and in the month of March, 1896, the Plaintiff had the land set forth in the said agreement surveyed in accordance with a request by the Defendant Company, and the said land was more particularly defined and described as set forth in Paragraph 3 hereof, which survey was accepted and agreed to by the Defendant Company.

7. On the 28th April, 1896, the Plaintiff paid the Defendant Company the balance 30 of the purchase money due under the said agreement of the 28th of November, 1889, and the interest due thereon at the rate specified in the said agreement to the time of payment.

8. On the 8th day of May 1896 the defendant Company wrote to the Plaintiff a letter enclosing a conveyance from the Defendant Company to the Plaintiff of the inheritance in fee simple of and in the said hereditaments but subject to certain reservations in the words and figures following, that is to say:

"Saving and reserving to the said Company, their successors and assigns, and their 40 agents, servants, contractors, and workmen, the right to enter into and upon the said land, and cut and carry away any timber therefrom for railway purposes without paying compensation therefor:"

"And saving and reserving also to the said Company, their successors and assigns rights of way for their railway through the said land, and the right for themselves, their agents, servants, contractors and workmen to enter upon and take such parts of the said land as may be required for the stations and workshops of the said Company without paying compensation therefor."

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"And saving and reserving to the said Company, their successors and assigns, all coal, coal oil, ores, mines, minerals, and quarries whatsoever, in or under the land hereby granted or expressed so to be, with full liberty of ingress, egress and regress at all times for the said Company, their successors and assigns and their servants, agents and workmen, in, to and upon the said land, and either with or without railways, horses or other cattle, carts and wagons and other carriages, for the purpose of searching for, working, getting and carrying away the said coal, coal oil, ores, mines, minerals and quarries, and with full liberty also, for the said Company, their successors and assigns, and their servants, agents and workmen to sink, drive, make and use pits, shafts, drifts, adits, courses and water courses, and to erect and set up fire and other engines, machinery and works, and to open roads in, upon, under and over the said land, or any part or parts thereof, for the purposes of more conveniently working and carrying away the said mines, minerals and quarries and also to appropriate and use any part of the surface of the said land for depositing, placing and heaping thereon the minerals, waste, rubbish, and other substances that may be gotten from the said mines, minerals and quarries, the Company, their successors or assigns, paying reasonable compensation for such of the surface of the said land as may be taken, damaged or destroyed by said searching, working, getting and carrying away."

9. The Plaintiff returned the said conveyance to the Defendant Company and refused to accept the same on account of the said reservations therein contained.

10. The Defendant Company is carrying on mining operations in the neighbourhood of the land so purchased by the Plaintiff as described in the 3rd paragraph hereof and in so doing is wrongfully running a tunnel into Plaintiff's said land and is mining the coal from the Plaintiff's said land. The Defendant Company is also by its servants or workmen wrongfully occupying the house built on the said land as mentioned in the 5th paragraph hereof.

11. The Plaintiff has tendered a conveyance of inheritance thereof in fee simple of the said lands, tenements and hereditaments to the Defendant Company, and the Defendant Company has refused to execute the same, or to execute any conveyance other than the one containing the said reservations set forth in paragraph 8 herein.

12. The Plaintiff claims specific performance of the above agreement and that the Defendant Company may be ordered to execute a proper conveyance of the said lands to the Plaintiff.

The Plaintiff claims:

- (1.) Specific performance of the said agreement of the 28th day of November, 1889.
- (2.) That the Defendant Company may be ordered to execute a proper deed of conveyance of the said lands to the Plaintiff.
- (3.) An injunction restraining the Defendant Company, its servants, agents or workmen, from mining for coal and removing coal from off the land comprised in the said agreement of the 28th day of November, 1889:

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(4.) An account of all coal got from the lands by the Defendant Company, its servants, agents and workmen and every of them and of the value of such coal

Delivered this 8th day of February, 1897, by C. C. Pemberton, of 35 Yates street, Victoria, B.C., Solicitor for the Plaintiff.

To CHAS. E. POOLEY, Esq.,
Solicitor for the Defendant Company.

STATEMENT OF DEFENCE.

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1. The Defendants admit paragraphs 1 and 2 of the Statement of Claim.

2. The Defendants did not enter into the agreement alleged in paragraph 3 of the Statement of Claim.

3. John Trutch in the Statement of Claim referred to was not authorised to contract for the sale of any of the Defendants' lands, except with the reservations set out in paragraph 8 of the Statement of Claim, and any contract made by him as agent of the Defendants which did not contain such reservations was not within the scope of his employment and was wholly unauthorized by the Defendants.

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4. If the said John Trutch did make a contract with the said Plaintiff to sell him the land claimed by the Plaintiff in this action, and such contract amounts to a contract for the sale of said land without the reservations, then such agreement was entered into by mistake, as the said John Trutch never intended to contract to sell on behalf of the Defendant Company, nor did the Plaintiff intend to contract to buy the said land without the reservations aforesaid to the Defendant Company, and the intention of the said John Trutch was to deal with the surface rights only.

5. The alleged contract is not under the corporate seal of the Defendant Company.

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6. The lands mentioned in the receipt set out in paragraph 3 of the Statement of Claim are not part of Lot 6, Douglas District, and Lots 10 and 11, Range 1, Cranberry District.

7. The said John Trutch, on behalf of the Defendant Company, on or about the 28th day of November, 1889, agreed to sell to the Plaintiff the land referred to in the said receipt of that date, with the exceptions and reservations set out in paragraph 8 of the Statement of Claim, and in pursuance of such agreement the said John Trutch gave to the Plaintiff the said receipt set out in paragraph 3 of the Statement of Claim—such agreement was partly in writing and partly verbal.

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8. One of the terms of the said agreement was that the purchase money should be paid as follows:—\$120 on the 28th November, 1889, and the balance in three equal instalments of seventy-five cents an acre, at the expiration of one, two and three years from that date, with interest at the rate of six per cent. per annum.

9. The Plaintiff did not pay any of the said deferred payments of purchase money at the times appointed for payment thereof, but abandoned the land mentioned in the said receipt and declined to complete his contract for the purchase thereof.

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10. After such abandonment, viz: In or about the year 1893, the Plaintiff applied verbally to the Defendants to be allowed to purchase the land referred to in Paragraph 3 of the Statement of Claim as parts of Lot 6, Douglas District, and of Lots 10 and 11, Range 1, Cranberry District, and the Defendants, by their agent, then verbally agreed to sell the same, with the reservations aforesaid, for the same sum as the Plaintiff had originally agreed to pay for the land referred to in the said receipt of November 28th, 1889, and the Defendants have always been and are now ready and willing to convey the said parts of said Lots 6, 10 and 11 to the Plaintiff, with the exceptions and reservations aforesaid, but the Plaintiff declined to accept such conveyance.

10

11. The Defendants say that the 4th Section of the Statute of Frauds has not been complied with with respect to any of the said land.

12. Except in so far as the same are hereinbefore admitted, the Defendants deny each and all the several allegations and statements contained in each paragraph of the Plaintiff's Statement of Claim.

Delivered this 15th day of March, 1897, by Charles E. Pooley, of the firm of Davie, Pooley & Luxton, of 21 Bastion Street, Victoria, Defendants' Solicitor.

To C. C. PEMBERTON, ESQ.,
Plaintiff's Solicitor.

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REPLY.

The Plaintiff says that.

1. He joins issue.

2. As to the 2nd paragraph of the Statement of Defence, he says that the agreement set forth in paragraph 3 of the Statement of Claim is the agreement of the Defendant Company.

3. As to the 3rd paragraph of the Statement of Defence, he says that the said John Trutch was at the time of the execution of the agreement set forth in the 3rd paragraph of the Statement of Claim the Land Commissioner of the Defendant Company, and agreed to sell the said lands for the Defendant Company as such Land Commissioner, without any reservations whatever.

4. As to paragraph 4 of the Statement of Defence he says that the agreement entered into for the sale of the said lands is in writing, and is as set forth in the 3rd paragraph of the Statement of Claim, and the same was not entered into by mistake.

5. As to paragraph 4 of the Statement of Defence he says that the defendant Company ratified the agreement set forth in the 3rd paragraph of the Statement of Claim and accepted all principal and interest that was due and payable thereunder.

6. As to paragraph 6 of the Statement of Defence he says that the lands mentioned in the said agreement set forth in the 3rd paragraph of the Statement of Claim form part of Lot 6, Douglas District, and Lots 10 and 11 Range 1, Cranberry District—having

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been so found, by a survey made on the ground, of the said lands set forth in the said agreement, which survey was accepted by the defendant Company.

7. As to paragraph 7 of the Statement of Defence, he says that the agreement between him and the defendant Company was reduced into writing, and is set forth in the 3rd paragraph of the Statement of Claim, and was made without any exceptions or reservations as set forth in paragraph 8 of the Statement of Claim or any reservations whatever.

8. As to paragraph 8 of the Statement of Defence, he admits the same, and says that time was not of the essence of the agreement.

9. As to paragraph 9 of the Statement of Defence, he says that the non-payment¹⁰ of the deferred payments at the times appointed was waived by the defendant Company, and said payments were accepted, together with the accrued interest due thereon, on the 28th day of April, 1896, and further says that he did not abandon the land mentioned, nor did he decline to complete his contract for the purchase thereof.

10. As to paragraph 10 of the Statement of Defence, he says that the only agreement between him and the Defendant Company was that set forth in the 3rd paragraph of the Statement of Claim, and the same is in writing that he never applied verbally to be allowed to purchase the said land, nor did he agree with any agent of the Defendant²⁰ Company to purchase the said lands other than by the agreement set forth in the 3rd paragraph of the Statement of Claim.

11. As to paragraph 11 of the Statement of Defence, he says that there has been part performance which takes the agreement of sale of the said land out of the 4th Section of the Statute of Frauds.

12. The agreement being in writing and within the Statute of Frauds, the Plaintiff will object to the introduction of parol evidence to vary or alter the same.

13. The Plaintiff will object to any evidence of mistake in that the agreement is³⁰ plain in its terms and the Defendant Company cannot evade performance of it by the simple statement of mistake.

Filed and delivered this 5th day of April, 1897, by C. C. Pemberton, of 35 Yates street, Victoria, B. C., Solicitor for the Plaintiff.

To CHAS. E. POOLEY, ESQ.,
Solicitor for the Defendant Company.

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IN THE SUPREME COURT OF BRITISH COLUMBIA.

(Before the Honorable the Chief Justice.)

VICTORIA, 17th June, 1897, 11 a. m. 10

BETWEEN

FRANK VICKER HOBBS,

PLAINTIFF,

AND

THE ESQUIMALT AND NANAIMO RAILWAY COMPANY,

20

DEFENDANT.

EVIDENCE AND PROCEEDINGS AT THE TRIAL.

Mr. McPhillips appearing on behalf of the Plaintiffs.

Mr. Pooley, Q. C., appearing on behalf of the Defendants.

30

FRANK VICKER HOBBS, the Plaintiff, being duly sworn, testified :

Examined by Mr. McPhillips. Q. Your name? A. Frank Vicker Hobbs.

Q. And occupation? A. At present, storekeeper.

Q. What kind of a storekeeper, what business? A. Furniture.

Q. On Douglas street in the City of Victoria? A. On Douglas street, yes sir;
No. 135.

Q. Now, when did you first come to British Columbia? A. On the 19th of May, 40
1889.

Q. Where did you come from? A. England.

Q. And upon your arrival—where did you first arrive? In what part of British
Columbia? A. I came right through to Victoria.

Q. And what did you engage in; any business? A. Labouring.

Q. Well how long did you pursue that in the City of Victoria? A. I am not ex-
actly sure, but four or five weeks.

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Q. And later on went— A. And later on I went down the West Coast. I helped to build that telegraph line which goes away down to Bonilla Point. I was out in the woods all summer

Q. In connection with that work, you were out in the woods all summer of the summer of 1889? A. Yes

Q. And after that what? A. We got through in November and we returned to Victoria?

Q. What did you do in Victoria? We come to the question at issue: Did you have anything to do with the E-Quimalt and Nanaimo Railway Company? A. Yes. It was my original intention in coming to this country to acquire land.

Q. It was your original intention to acquire land when you came to this country? A. Yes. And in pursuance of that intention I had a conference with my brother, and I decided to go up and look at a piece of land near Nanaimo which I had heard of while down the West Coast.

Q. Was that the land that you subsequently applied for? A. No, it is not the land that I subsequently applied for. It is a piece in the near neighbourhood. But I was told that the reservation was between the road and this piece of land.

Objected to as hearsay. A. It would not be suitable.

The Court: You need not tell us about any conversations, or what caused you to do it; just tell us what you did. A. I saw this piece of land.

The Court: Q. That is the land in dispute? A. Yes sir.

Mr. McPhillips: Q. Now will you just outline in what way you saw it and what you did upon it, before you came to treat with the Defendant Company? A. I went over from Stark's place; that is in a westerly direction from Stark's. I had a good look over the land, and found there were four swamps which would be fairly easy to drain, easy to clear, and I thought it would suit me. I put in an initial post

Q. You sunk this post yourself did you? A. Yes. And I returned to Stark's place and there made out the description.

Q. There made out a description.

Upon request of Mr. McPhillips, Mr. Pooley produced description of property made by witness.

Q. When you say you made out a description; did you write out a description? A. Yes.

Q. (The document handed witness) Was that it? A. That is not the one which I made out there, but this a copy from that.

Q. Well, you never produced that over to the Defendant Company? A. No, I gave that to the Defendant Company.

Q. I see. Well you did make out a description in writing? A. Yes.

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Q. And what did you do after that? A. I went to Mr. Shaw who was station agent at Nanaimo. I had been told that he was acting as the Company's agent. And I told Mr. Shaw I understood he was the Company's agent and I wished to purchase a piece of land up there; and he said "No, I am not the Company's agent here now."

Q. He said he was not the Company's agent now? A. Yes.

Q. Did he say who was? A. He referred me to Mr. John Trutch at the Company's office, corner of Broughton and Government, streets, Victoria. He told me he did not sell any of the Company's land now.

Q. He said he did not sell any of the Company's lands? A. Yes.

Q. Well, he was not an officer to deal with lands, well is that it? A. Not at that time, that was what he told me.

Q. He could not sell any land? A. No.

Q. However, he referred you to Mr. John Trutch. What happened after that; did you come down to Victoria? A. I came to Victoria; went up to the Company's office and saw Mr. John Trutch.

Q. Do you remember what day that was? A. On the 28th of November, 1889.

Q. Then you went to this office of the Defendant Company, corner of Broughton and Government streets? A. Yes.

Q. Who did you find there? A. John Trutch.

Q. I think Mr. John Trutch is in the Court Room? A. Yes, I recognize Mr. Trutch. I told him I wished to purchase a piece of land up there, and he said, "Where is it, what is it"; I showed him the description.

Q. You showed him a description? A. Yes.

Q. That is the description you showed him (document handed witness)? A. Yes.

The document referred to was here put in by Mr. McPhillips, marked Exhibit "B."

The Court: Q. You handed him that description? A. Yes.

Q. Which is a copy you had made up at Stark's? A. Yes.

The Court: That is produced by the Defendant Company. Mr. McPhillips: Yes, my Lord.

Mr. McPhillips: Q. Is that your signature (indicating on Exhibit "B")? A. That is my signature, yes.

Q. What did you do with this application? A. I left it with Mr. Trutch.

Q. You produced it to Mr. Trutch, handed it to him? A. Yes.

Q. What did he do with it? A. He read it and said, "Oh, up near Nanaimo, I see?" "Yes," I answered him.

Q. What did you say in answer to that? A. And I told him yes, it was near Stark's. He then asked me was I going to pay for it then; and I asked if I would have

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to pay for it all then, and he told me, no, I could pay \$120 then and the rest in one, two and three years.

The Court: Q. Who said that? A. Mr. Trutch, my Lord.

Mr. McPhillips: Q. Had he stated to you what amount per acre he would charge for it? A. Three dollars per acre, yes. I had been told by Mr. Stark that it would cost \$3.00 per acre.

Q. But did Mr. Trutch tell you? A. Mr. Trutch told me that it was \$3.00 an acre. 10

Q. That the price of the land was \$3.00 an acre. A. Yes.

Q. Well, what happened after that? A. Well, I paid him \$120 and he gave me a receipt.

The Court: Q. You paid him \$120 then and there, did you? A. Yes sir, and he gave me a receipt—with a receipt and the terms of the sale.

Mr. McPhillips: Q. Do you know who wrote that? A. Yes, Mr. John Trutch wrote that in my presence.

Q. He handed you that (document handed to witness)? A. That is the document. 20

Q. The document now handed to you; which you have always kept? Is that not a fact? A. Yes.

Document referred to was put in marked Exhibit "C."

Q. This Exhibit "C" you received from him. A. Yes.

Q. You say that he wrote that in your presence? A. Yes.

Q. Did you see him write it? A. I saw him write it; yes.

Q. And sign it. A. Yes. 30

Q. And he handed it to you? A. Handed it to me.

Q. You say that has always been in your possession? A. That has always been in my possession until I handed it to you.

Q. Until you handed it to your Solicitors? A. I remember asking Mr. Trutch that in the event of my not being able to get employed so as to get further money to meet these payments on time—just then he said, "Oh, that won't matter much, the Company won't be hard on you, they are not hard on the working men." 40

Q. Well, is that all that took place between you and Mr. Trutch at that time? A. That is all that took place between me and Mr. Trutch at that time.

Q. As to the description. Now you handed him an application; it differed some from the description contained in this writing of the 28th of November? A. Yes, slightly.

Q. Well, did he settle on the description—Mr. Trutch? A. Well, Mr. Trutch wrote the description from my description, but I think Mr. Period inserted the district in

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which he supposed the land would be in. Of course I did not know what district it was in. This was my first visit to Nanaimo, and I was only up there a couple of days in all.

Q. You handed him the application which was in writing? A. Yes.

Q. He did not dissent from that; he was agreeable to give you that land? A. Yes.

Q. He was agreeable that you should have that land set forth in that application? But he described it, or amplified it, whatever it may be, made it a little better, as he thought, perhaps, in the agreement? A. Yes.

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Q. That is his doing? A. That is his doing, yes.

Q. And you say that is all that took place between you and Mr. Trutch? A. That is all

Q. Now after you got that agreement of the 28th of November, 1889, what did you proceed to do in relation to this land? A. Within two days—I am not sure whether it was the next day or the day after; I rather think it was the day after. Two days after this I went to Nanaimo.

Q. You went to Nanaimo? A. Yes. Bought some tools, went out on the place, 20 got some neighbors to assist me, and started to erect a house or cabin—log cabin.

Q. Where? A. On this land.

Q. On this particular land? A. On this land which I had seen and which I described.

Q. And which you said you had put an initial post in? A. Yes.

Q. Now, speaking of this ridge, and the swamp that is referred to in that application, and the post, where did you put your cabin? A. I put the cabin about 150 or 200 yards from that post.

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The Court: Q. From where you planted the initial post? A. Yes, my Lord.

Mr. McPhillips: Q. Will you give the bearing from the post, north, south, east or west? A. It was in a south east direction.

Q. In a south-east direction? A. As near as I can tell.

Q. Well, did you complete that building? A. No; before we could complete it a very heavy fall of snow came. It snowed until we had three feet of snow there, and we had no house to live in; we had no tent; we had to stop in a little booth of green boughs; and it was too deep; we had to stop and finish the work, and I had to leave.

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Q. Who were those men who were with you at that time? A. Mr. Whittaker, who is living out in Nanaimo River Falls; a young man named Brady Stovall. We prepared the logs, and when we were ready for raising—

Q. You mentioned Whittaker, Stovall and yourself? A. Yes. When we had the logs ready for raising I got two other of my neighbors to come over and help us to raise it.

Q. Who were those? A. Ezra Bramley and Mr. Ralph Bramley; two brothers. We got the cabin about five logs high, and at this time we were working through about two feet of snow and we had to quit.

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Q. About five logs high and you had to quit? A. Yes. Our neighbors returned home; I went up and stayed a little while with Mr. Whittaker.

Q. And then? A. The snow kept on, and it was not convenient to stay there with him, so I went to Nanaimo and boarded at the Grand Hotel there. I stayed there the balance of the winter.

Q. That would be about what month that you went to Nanaimo? A. I think it was in January.

Q. And when you went on the property you think was when? A. Was in 10 November. And I was also on the place on Christmas Day.

Q. Christmas Day of 1889? A. 1889, yes sir. I went from Stark's over.

Q. That would be after you had desisted from building? A. Yes. There had come a frost and there was a crust on the snow, and I walked over there for a hunt. I remember the circumstance well.

Q. Then, go on. When was the next time you did any work, or was on the property? A. I went out on the place again, I believe it was in April of 1890; went out 20 for my tools.

Q. Your tools had been left in the building that you had been erecting? A. Yes.

Q. Any one with you? A. Yes, a Mr. Murray—Mr. Allan Murray.

Q. Allan Murray? A. Yes.

Q. What did you do then? A. We had entered into a contract to clear some land in Nanaimo and we went out for the tools. Took the tools back and worked there all summer.

Q. Well, now, you did not do any more work on the cabin at that time? A. No. 30

Q. Well then when did you again return to the land? A. In the Fall.

Q. Fall of 1890? A. Yes, I think October.

Q. What did you do then? A. I started to build another cabin in another place.

Q. In another place. You determined on abandoning this one? A. Yes it was on low land and I thought I saw a more suitable site, a more pleasant outlook.

Q. The location of the next one, considering the first one's position where was the second one? A. In a southerly direction.

Q. In a southerly direction from the first one you had started to erect? A. Yes. 40 It might be a point or two east.

Q. And how far away. A. Maybe about 300 yards. I have never measured this distance.

Q. You think in a southerly direction? A. A southerly direction?

Q. How far would that be from the initial post which you have spoken of? A. Still further from the initial post.

Q. That much farther? A. That much farther.

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Q. Well then, what did you do there? A. I built a house with the help of Mr. Murray and the Stark's; and stayed there—

Q. You completed this house, did you? A. Yes.

Q. What size dimensions was it? A. It was 18 by 14.

Q. That is the second house? A. Yes. I think that is the measure, if I remember right.

Q. 18 by 14? A. 18 by 14.

Q. And you completed this? A. Yes.

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Q. And after having completed it what did you do? A. I remained there most of the winter. Mr. Murray returned to town.

Q. That would be about all the winter of 1890 and 1891? A. 1890 and 1891

Q. Then after that? A. I was there till the spring, and then I went to Nanaimo.

Q. You were there till the spring of 1891? A. Yes.

Q. Did you do any work on the land at all? A. I done a little slashing, clearing. Started to build a chimney to my cabin, which I found quite a big job; took lots of time; 20 only got it up part way then.

Q. Did you do anything else; plant anything or do anything of that kind? A. No; I did not plant anything there at that time. I had planted a few bushes when I was there before; a few fruit bushes there.

Q. Fruit bushes? A. Yes.

Q. This takes you up to the spring of 1891; what did you do then? A. Went to Nanaimo and got work.

Q. And when did you next return to the land? A. I was up occasionally.

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Q. You went to Nanaimo in the spring and got work, and returned to the pre-emption occasionally? A. Yes.

Q. Now then, that took you up to when; sometime in the spring of 1891? A. I worked in Nanaimo all the summer of 1891 and a good part of the winter of 1891, 1892. And I was on the place again at intervals in the spring of 1892.

Q. Well then, what did you after that; in the spring of 1892, what did you do? A. I left the land and again worked a little while in Nanaimo; I got a little work there and then I went to Alberni—walked to Alberni.

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Q. That was in 1892? A. Yes, 1892. And from Alberni I went back again to Nanaimo for a few weeks, and then to Victoria.

Q. Then to Victoria? A. Yes.

Q. Now did you place yourself in communication with the Defendant Company, do you remember, in April, 1892? A. Yes; I remember just prior to going to Alberni I thought I would like to survey the land; thought I would like to get the land surveyed; and I wrote a letter.

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Q. What did you do? A. I wrote to the Company.

At the request of Mr. McPhillips Mr. Pooley produced letter, 4th April, 1892, from Plaintiff to Defendant (letter handed to witness), dated 4th April, 1892. A. That is the letter.

Q. You recognize this as being the letter? A. Yes.

The letter was put in by Mr. McPhillips, marked Exhibit "D."

Q. Now you speak there about—you say, "I do not know where the nearest corner post is"; what do you mean by that? A. By that I mean that I did not know of any 10 surveyed land nearer than Stark's to survey from.

Q. That was not your post that you were speaking of there? A. Corner post—yes.

Q. "I can only survey from my post"; is that your post? A. Yes.

Q. The only post you knew of any surveyed land—the nearest one was what? A. Stark's.

Q. Now in answer to that, did you get a letter? A. I got reply from the Company's land agent at that time, Mr. Gore, telling me that I could employ any Provincial 20 Land Surveyor.

Q. (Letter handed to witness). A. That is the letter.

Said letter was put by Mr. McPhillips, marked Exhibit "E."

Q. (Reading Exhibit "E.") You got that letter, you say? A. Yes.

Q. And there was an enclosure in it? A. Yes; there was an enclosure, a plan.

Q. I hand you this (plan handed to witness). A. That is the enclosure; I recognize it. 30

Same was put in marked Exhibit "F."

Q. Mr. Gore said in his letter that, as near as he could tell, the part coloured red covered your land. Do you see the portion coloured red? A. Yes.

Q. Did it describe your land? A. No; not all the land I required.

Q. It did not describe all the land you required? A. It did not describe the portion of land upon which I built my house.

The Court: Q. This description was not accurate? A. No, I don't say it was not accurate; I say it did not describe the land which I actually wanted and on which I 40 built my house.

Mr. McPhillips: Q. Or where you had placed your initial post? A. No; that post would not be on that land.

Q. That is, it did not cover your application, did it? A. No.

Q. That you left with the Defendant Company? A. No; it did not.

The Court: Q. It did not cover the land embraced in your application? A. Yes.

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Mr. McPhillips: Q. Is the land embraced in the application the same as John Trutch's receipt; there is no variance in the two? A. There is no actual variance in them.

Q. There is no actual variance?

Mr. Pooley: That is going to be a matter of evidence.

Q. Well now, that red portion covered a portion of the land? A. Covered the southerly portion.

Q. The southerly portion, but did not cover the major portion to the north? A. 10 No it did not.

Q. The larger portion. What did you do in reference to that after having received that tracing? A. This was just prior to my going to Alberni.

Q. You received this letter and tracing just prior to your going to Alberni? A. Yes. And when I had an idea that I might enter into business at Alberni I gave up the idea for the time. After that I came to Victoria and I did not survey. But on coming to Victoria I went to the Land Commissioner's Office.

The Court: Q. You went to Alberni; how long did you stop there before coming 20 to Victoria? A. I think about a month my Lord.

Q. And then you came to Victoria? A. To Nanaimo and then from Nanaimo to Victoria.

Q. That was in 1892? A. Yes, my Lord. I did not get the land surveyed. So after getting back to Victoria I called at the E. & N. Railway Co's. office and had an interview with Mr Gore the Company's Land Commissioner.

Mr. McPhillips: Q. In reference to what? A. In reference to the discrepancy between the land which he had marked red on that plan and the land which I really 30 wanted.

Q. You saw Mr. Gore in the office of the Company, did you? A. Yes.

Q. What did you say to him? A. I told him that between the times of writing that letter in which I got this plan to reply—between the times of my writing that letter and going to Victoria I had found certain posts there, certain corner posts marked the Victoria Lumber Company's land. Also I had seen a post marked Anthony Anderson. That gave me an idea as to just where on the plan my land would come. So I explained to Mr. Gore. He showed me the plan and I could show him just where I wanted this 40 land.

Q. He showed you a plan in the office, did he? A. Yes showing the Lumber Company's posts and Anderson's posts marked on it. So on that plan I could show Mr. Gore where my land was.

Q. And did you show him? A. I did.

Q. Well what took place when you did that? A. There was nothing that I can remember of any importance that took place at that time.

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Q. Did he make any statement about it? A. Not other than they were pleased to locate it nearer than they had; they thought it was down there farther to the south the land that I wanted; and he said "When you survey you know you can go either way as long as you take an even portion—you must join to some even portion."

Q. That is what they always kept insisting on, that there should be no broken portions? A. Yes.

Q. That is what the Company was particular about? A. They were particular there should be no fractional portions.

The Court: Q. They said when you surveyed you could take either way so long as you did not leave any fraction? A. Yes. I remember Mr. Gore saying that I could go either way a half a section; there were three quarter sections, and I could take either one of the three. In reality the most northerly of the three was the one I wanted.

Mr. McPhillips: Q. There was no dispute then about your being entitled to the land you pointed out to him? A. No dispute at all.

Q. And the Company did not say they were unable to convey it to you or anything of that kind? A. No, nothing was said of that character.

Q. That was when you came down to Victoria in 1892? What did you proceed to do then? To embark in business? A. I embarked in business which I am now engaged in. At that time I was keeping store on Fort street; I have since moved down to Douglas, where I have been ever since.

Q. Now what about this particular land? What position did you leave it in? At least you had that agreement with the Defendant Company; and what about it? A. Well I knew the land was mine; I had bought and made a first payment on it and as I was in business and had but a very limited capital I could not afford to finish paying for it at that time, I preferred to use my money in my business and pay the interest that it states.

Q. You knew the rate of interest that it carried? A. Yes. A low rate of interest, a lower rate of interest than I could borrow money on.

Q. Yes; the legal rate of interest? A. Yes, six per cent.

Q. And that is the way you viewed the matter between you and the Defendant? A. Yes; my money was worth more to me than six per cent.

Q. Now after that, I think in 1893, you received some notices from the Defendant Company about paying something that was owing by you under that agreement of the 28th of November, 1889? A. I did.

Q. (Paper handed to witness). You received that notice? A. Yes.

Same was put in marked Exhibit "G."

Q. You got this notice, then, Exhibit "G." A. Yes.

Q. Where did you get it? It is addressed to Frank Vicker Hobbs, Bright District, and then there is Victoria, B. C., pencilled under it? A. I was in Victoria.

Q. You got that notice in any case? A. Yes.

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Q. Then you got another notice (paper handed to witness)? A. Yes I got another in February, 1894.

Q. This is it, February 15th, 1894.

The document was put in marked Exhibit "H."

Q. You got this notice also, Exhibit "H"? A. Yes.

Q. What did you do in reference to those notices? A. No; I could not afford to pay for the land, and I took no action in regard to the notices.

Q. At the time you received them you could not afford to put up the balance, and¹⁰ you did not take any notice of them? A. No; I looked up my agreement and I found that I ran no risk of losing the land.

Q. That was your notion then? A. Yes; that the interest was going on and that I could not afford to pay it. I could better afford to pay the interest.

Q. Then you had in mind, I suppose, that statement that Mr. Trutch had made to you, too? A. Yes; that the Company would not be hard on me.

Q. And relying on that you felt satisfied that the Company would not do anything?²⁰
A. Quite so.

Q. That was up to the 15th of November, 1894. Do you remember when you next did anything in reference to this property? A. Yes; in 1895.

Q. What did you do then? A. I went down to the Company's office, on Store street, and tendered payment for the balance and interest and desired to complete the purchase.

Q. Now tell the Court who you saw down at the Company's office. They were then on Store street? A. Yes.

Q. Do you remember what month in 1895? A. It was in 1895 and it was in the³⁰ fall, I think in November; I am not quite sure of that.

Q. At any rate in the fall of 1895? A. Yes.

Q. And you found who there? A. Mr. Solly.

Q. The now Land Commissioner, and the then Land Commissioner of the Defendant Company? A. Yes.

Q. Was he known to you? A. No.

Q. You made yourself known to him? A. I made myself known to him, I told⁴⁰ him that my name was Hobbs and that I wished to complete the purchase of a piece of land which I had agreed to buy from the Defendant Company near Nanaimo and Mr. Solly told me that I was late, rather—

Q. That you were late—? A. Over that.

Q. Did he look up any papers or anything? A. I don't remember his looking up any papers at the first part of our interview. Later he referred to a schedule which he had there with regard to notices—a schedule of notices he had sent out.

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Q. At the same interview? A. Yes. He said that my interest in that land had lapsed. I made him some remark about the money which I had paid on it, and he said that he considered that had forfeited to the company. I wanted to know under what clause in my agreement. I had my agreement with me at the time and I referred to it and said I could not see any reason there why my interest in the land should lapse or why my money should be forfeited. He asked me to allow him to look at it a minute and I did so. He took it and looked at it and said, "I will go and see Mr. Dunsmuir on this subject," or some words to that effect. At any rate he retired with the agreement in his possession. And after the lapse of a few minutes he came into the office again. 10

Q. He took your agreement? A. Yes.

Q. That is the same one that you produce here? A. Yes, the same one that I produced.

Q. Exhibit "C." And he went to see Mr. Dunsmuir, you assume? A. Yes.

Q. That would be Mr. James Dunsmuir, was it? A. That is what I supposed. On his re-entering the office he said no he had instructions from the Company to accept no more payments on that land. I remarked that I thought that it was a mean way to serve me, now that the land was likely to be of value. And I also told Mr. Solly that I thought I could compel the Company to accept my money and grant me a conveyance— 20 or accept my money.

Q. When you said you thought the land would be of value, what did you mean by that? A. I had heard just previous to this that coal had been discovered in the near neighbourhood.

Q. In the near neighbourhood? A. Yes; the E. & N. Extension Mine had been discovered in the summer previous. I had been told this by Mr. Hodgson. 30

Q. When you say "value," that is relative value is it? A. Well, if there was a coal mine started there, and made a mining community started there, certainly my land would be very valuable.

Q. That was your view of it? A. Yes; that was my view of it.

Q. Not that there was coal on your land? A. I did not know that there was coal on my land; but I knew that five acre lots within three or four miles of Nanaimo were worth several hundred dollars an acre, and if there was a mining community started up around my place, why naturally my land would certainly be of more value. 40

Q. That is what you had in your mind. A. And Mr. Solly said, "Well, if you have any money to waste in law I guess we will meet you"

Q. Is that all that took place between you and Mr. Solly that day? A. That is all that took place. I left the office then.

Q. And I think you consulted solicitors after that? A. Yes; soon after that I consulted the firm of Messrs. Hunter & Duff—Hunter, Duff & Oliver, I think it is—to proceed and try and establish my rights.

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Mr. McPhillips: There is certain correspondence, which I do not think is material in my case, which sprung between Hunter & Duff and the Defendant Company. I am hardly in a position to put it in; at the same time my learned friend is cognizant of it, and I am:

The Court: The witness probably knows what was the result of this correspondence or whether there was any result. He can say that, and you can put in the correspondence afterwards if necessary.

Q. The result of your consulting with Hunter & Duff was what? A. I understand the firm of Hunter & Duff wrote to the Defendant Company. 10

The Court: Q. Did you see anything more of the Defendant Company in consequence of the correspondence? That is what we want? A. Yes.

Mr. Pooley: Q. What is the witness looking at? A. I am looking at notes as to dates.

Q. Were those notes of memoranda made at the time, that you are looking at? A. No they were not.

The notes referred to were here handed to Mr. Pooley. 20

Mr. Pooley: I have no objection to his looking at it to refresh his memory.

Mr. McPhillips: Q. They are merely dates? A. They are merely dates of the transactions as near as I can get at it. And I wish to refresh my memory as to dates. Mr. Solly called at my store to see me.

Q. The result of the correspondence was that Mr. Solly called at your store? A. Yes.

Q. When? A. I think it was in the month of February of 1896; and he told me that he would like me to come down to the office and have a talk over this affair and my land, he thought the Company would now grant me a conveyance of it, I was rather busy in the store at the time and had but very little time to speak to Mr. Solly. And I told him all right, what did they want? Well, he said, come down to the office, and have a talk, we would rather deal with you than through a firm of solicitors. 30

Q. Yes? A. I had almost forgotten that at my preliminary examination about that interview. I did go down with Mr. Solly. I went down to the office shortly afterwards.

Q. At the time you were examined you had forgotten; is that it? A. I had forgotten; I thought I had not gone down; but I remember; on hearing Mr. Solly's evidence it refreshed my memory, and I remember I did go down. 40

Q. You heard Mr. Solly give his evidence? A. Yes; and I recollect now I went down and I had an interview with Mr. Solly, and he showed me a plan, and told me that in surveying their coal lands in the neighborhood the surveyors had located my cabin, and they knew exactly the lines of my land now. I asked Mr. Solly and he gave me a tracing of that for my guidance in surveying—he promised to do so and eventually did.

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Q. When did he do it; do you remember under what circumstances? A. He left it at my store.

Q. I show you that (tracing handed to witness). A. That is the tracing.

Q. That was left for you? A. That was left with me, yes.

The tracing was put in, marked Exhibit "I."

Q. That is the exhibit which is now marked "I"? A. Yes.

Q. And I see that has on it "Lot 6, F. V. Hobbs' Cabin," on a square traced on it?

A. Yes, he explained it to me that that square mark there traced on it showed the position of the cabin. 10

Q. And that tied on to the Victoria Lumber Company's Timber Limit? A. Yes.

Q. Well, you think that was in February, was it, or— A. I am not quite sure of the dates.

Q. Somewhere about February, 1896? A. I think it was 1896; February or March, I am not exactly sure.

Q. Well, what was the position of the matter between you and the Company at that time? How did matters stand according to Mr. Solly, and any position taken? A. At that time they were willing to grant me a conveyance of the land. 20

Q. He told you previously that he thought the Company was willing to convey to you? A. Yes.

Q. There was no dispute standing then? A. No dispute whatever then. I also got a letter from the Company giving me two months to complete the purchase in.

Q. You got a letter from the Company dated March 2nd, 1896 (handed to witness)?

A. Yes. 30

Q. This is the letter you received? A. That is the letter I received.

Same was put in evidence marked Exhibit "J."

Q. In pursuance of that letter of March 2nd, 1896, what did you do? A. I proceeded to get the land surveyed.

Q. And who did you employ? A. I employed Mr. Priest.

Q. Did you do that immediately or soon after? A. Soon after; it was early in the month of April.

Q. Early in the month of April you employed Mr. Priest. He is one of the gentlemen who had been previously suggested? A. Yes. 40

Q. In Mr. Gore's letter to be satisfactory? A. Yes.

Q. Then you employed Mr. Priest, of where? A. Nanaimo.

Q. Provincial Land Surveyor? A. Provincial Land Surveyor.

Q. Did you employ him personally? A. I went up to see him; I employed him and Mr. Charley Holmes and another man, whose name I forget, who was living near my place at the time. I also saw Mr. Murray; he went there with me.

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Q. Mr. Priest, Mr. Murray, and whom? A. Charley Holmes.

Q. Where did you go? A. I went to Nanaimo and from there to the land,

Q. You went to Nanaimo and employed Mr. Priest? A. I went to Nanaimo and got Mr. Murray and went to the land, and then went to Nanaimo and got Mr. Priest.

Q. And having got Mr. Priest, what was done? A. He surveyed the land.

Q. The land was surveyed? A. Yes. I handed Mr. Priest that tracing which Mr. Solly had left at the store for me; and shewed him my original paper.

Q. Of the 28th of November, 1889? A. Of the 28th of November, 1889. 10

Q. Exhibit "C", this writing here (indicating)? A. Yes.

The Court: Q. And the last plan you got? A. The last plan I got. I am not quite sure whether I had the one that is coloured red by Mr. Gore or not.

Mr. McPhillips: Q. That is Exhibit "F"? A. I might have had that; I am not sure whether I handed that to him or not; but I know Mr. Priest had the other.

Q. The one Mr. Solly had given you? A. Yes.

Q. Now did you accompany Mr. Priest when he made the survey? A. Yes; I so assisted to blaze the survey.

Q. Do you know what point he started from? A. He started from one of the Lumber Company's posts.

Q. And described in the land in a block; is not that it? A. Yes.

Q. Forty chains square; is that it? A. Forty chains square; that is it.

Q. And where was this house of yours, in connection with that survey? A. It was very near the centre of the place.

Q. Very near the centre of the place; this is the finished house? A. Yes. It 30 might be a little north of the centre; that is in my opinion; I could not say, of course.

Q. That was consistent with your intention, you say? A. Yes; the survey took in all four of these swamps, which I originally wanted.

Q. It was consistent with your original application? A. Yes; strictly in accordance.

Q. Then you did not survey any different land than what you applied for? A. No, but the survey proved to me that 160 acres was rather larger than I thought it was and took in more land than I thought I would get.

Q. It took in more land than you thought you would get? A. Took in more land 40 than I thought I would get

Q. Now, after that was done, I think you advised the Company of its being done? A. I did. A few days after, my Lord, I asked them had they received the field notes and were they satisfied.

Mr. McPhillips: We will get the letter itself, the letter of the 10th of April.

Mr. Pooley produced the letter.

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Q. You wrote them a letter. Now I hand you a letter (handed to witness). A. Yes, I recognize the letter; that is the one.

The letter was put in marked Exhibit "K."

Q. That is the letter you sent? A. That is the letter.

Q. Now you mention there Cranberry and Douglas District. We will get that evidence more particularly from the Surveyor, but as a fact it overlaps in Cranberry District a little? A. Yes.

Q. And it has been called by the Defendant Company, Lot 6, Douglas District? 10
A. Yes.

Q. Although it comes into the other district and is a dividing line, runs right through your property, between the two districts? A. Yes.

Q. You got a letter then in reply to that, did you not? A. I did.

Q. Letter dated 11th of April, 1896, (handed to witness); that is the letter you received? A. Yes.

Put in evidence by Mr. McPhillips, marked Exhibit "L".

Q. Now after getting that I think you got another communication from the Railway 20
Company? A. I did; stating that the time for payment was nearly up.

Q. Is that it. A. Yes, that is it.

Q. You got the letter dated 27th April, 1896.

Put in marked Exhibit "M."

Q. You received that Exhibit "M" and what did you do after that? A. The
very next day I sent a marked bank cheque to the Company.

The Court: Q. You sent a marked cheque for the amount? A. Yes my Lord 30
and a letter.

Q. A marked cheque upon what bank? A. The Bank of British Columbia.

Q. Payable to whom? A. The E. & N. R'y Co., I believe.

At request of Mr. McPhillips Mr. Pooley produced documents.

Q. You sent a letter and a marked cheque. Now are these the ones (handed to
witness). A. Yes.

Letter put in marked Exhibit "N"; dated 28th April, 1896: Cheque of same date, 40
put in marked Exhibit "O."

Q. Now, after sending that, did you receive my acknowledgment of having sent it?
A. Yes, I received a receipt.

Q. Did you receive a letter (letter handed witness)? You got a letter enclosing a
receipt. Is that the letter? A. Yes, that is the letter.

Q. And that is the receipt? A. That is the receipt.

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Letter put in marked Exhibit "P," dated April 29th, 1896: Receipt put in marked Exhibit "Q," same date.

Q. Well, what next transpired? About a week after I had a deed sent me. I received a deed.

Q. A letter and a deed? A. A letter and a deed, and a form of receipt.

Q. And a form of receipt. Now is that the letter and form of receipt that you refer to (handed to witness)? A. Yes.

Letter put in marked Exhibit "R," dated May 8th, 1896.

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Receipt put in marked Exhibit "S."

At request of Mr. McPhillips, Mr. Pooley produced form of deed.

Q. There was a deed in that? A. Yes.

Q. I hand you this deed to see whether you recognize it (handed to witness)? A. Yes, I believe that is the deed; I made no mark upon it by which I can recognize it, but I believe it to be the deed.

Same was put in marked Exhibit "T."

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Court here adjourned for an hour.

At 2:15 p. m. Court met pursuant to adjournment.

Direct examination of the witness, Hobbs, continued by Mr. McPhillips:

Q. Now you thought you recognized this Exhibit "T," which is the deed? A. Yes.

Q. Well, looking at it, looking at the plan which is on its face (handed to witness); is that square marked red the description of the land you claim? A. Yes.

Q. That is the description of the land you claim? A. That is the description of the land I claim.

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Q. That is called Lot 6, Douglas District. A. Yes sir.

Q. I see cabin marked on this, here? A. Yes.

Q. Is that the cabin you have spoken of? A. Yes.

Q. That is your house that you have spoken of. A. Yes.

Q. That is partly in Cranberry District and partly in Douglas? A. Yes.

Q. And, as you say, is the land that you claim of the Defendant Company?

Yes. That is the land that I went on, and built on, and the only land that I ever owned or endeavoured to claim from the Defendant Company.

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Q. Of course you were on the survey with Mr. Priest? A. Yes.

Q. The land purported to be conveyed to you in this deed of the 1st of May, 1896, that is Exhibit "T," that is the same land as Mr. Priest defined? A. Is the same land that Mr. Priest—

Q. The same land that you assisted Mr. Priest to define? A. Yes. And the same land that I originally wanted.

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Q. Well, do you find that ridge and swamp and post? A. Yes.

Q. And Berkeley's Creek? A. Yes.

Q. Now did you read this deed over when you received it? A. I did, yes.

Q. I see it is marked on the corner "L. H. Solly, Land Commissioner." After having read it over, what did you do? A. I showed it to my Solicitors and instructed them to return it.

Q. The result of it was what? A. I returned it to the Company.

Q. By letter, did you not? A. Yes.

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At the request of Mr. McPhillips, Mr. Pooley produced the letter, dated the 9th of May, 1896, same was handed to witness.

The Witness: Yes, that is the letter.

The letter was put in evidence by Mr. McPhillips, marked Exhibit "U."

Q. (Reading Exhibit "U") That was the letter you wrote? A. That was the letter I wrote when I returned the deed.

Q. And you returned this deed, Exhibit "T," with it? A. Yes.

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Q. Now that was on the 9th of May, 1896. A. I believe it was

Q. Well, did any of the officers of the Defendant Company come to you after that, or did you have any communication with them after that, or for some time? A. Not for some time. I did not that I can remember.

Q. Not for some time? A. No. The next communication I can remember was when the Defendant Company sent me a cheque.

Q. You got a letter from them did you, from the Defendant Company? A. I remember them sending me a cheque.

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Q. Do you know where that money is? A. I returned the moneys—

Q. Was there a letter with it? A. Yes. I left the letter with Messrs. Hunter & Duff, when I opened the letter.

Mr. McPhillips: Have you a copy of that letter Mr. Pooley? I have not the original one; I don't know as there is any objection to producing that. Letter of the 3rd of September.

Q. You don't know where that letter is now? A. No.

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Q. Have you asked Hunter & Duff for it. A. No.

Q. I mean to say they gave you all the papers they had, or were supposed to do so, at any rate; were they? You demanded the papers from them, did you not? Your Solicitors got the papers from Hunter & Duff. A. My Solicitor got all the papers.

The Court: You received the papers from your Solicitors, and that letter was not among them? A. Yes, I have not seen the letter since.

Q. You changed your solicitors? A. Yes, my Lord.

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Mr. Pooley produced copy of the letter.

Mr. McPhillips: Q. Well, you got a letter. Just read that (handed to witness).
A. Yes; I think that is a true copy of that letter to the best of my recollection.

Said copy of letter of September 3rd, 1896, was put in by Mr McPhillips, marked Exhibit "V."

At the request of Mr. McPhillips, Mr. Pooley produced cheque referred to in Exhibit "V."

Q. (Handed to witness) Is that the cheque you returned? A. Yes; I think that 10
is the cheque.

Put in by Mr. McPhillips, marked Exhibit "W."

Q. Well, you returned this cheque? A. I returned that cheque; yes.

Q. Do you remember whether you returned it or your solicitors? A. My solicitors returned it; I instructed my solicitors.

Q. That would be Hunter & Duff? Yes.

Q. Well, now, you say that you read that deed through. What was your objection to the deed? A. I objected to the reservations. The Company reserved the right 20
to the coal, coal oil, ores, mines, minerals and quarries, rights of way for railway and road, and timber; and when I bought I set quite a value on the timber that was on the land; had no idea but what I was entitled to all the timber and all that was on or under the land.

Q. You had no idea of any reservations? A. I had no idea of any reservations at all.

Q. Were there any notified to you? A. No, at no time.

Q. Nothing calling your attention to reservations? A. No. 30

Q. At any rate your agreement is in writing? A. Yes; and at the time of getting the agreement there were no reservations mentioned.

Q. Nothing mentioned to you? A. No.

Q. Or stated to you? A. Nothing shown or spoken of anything.

Q. Well, had you any knowledge of any reservations? A. Well, not before purchasing I had not. I had only lately arrived in the country and had very little opportunity to learn of it anyhow. I was only in the city of Victoria a few weeks before I 40
went out into the woods, and directly on coming in I made this purchase, and I knew nothing about the Company's land or any reservations.

The Court: Q. How long had you been here before you went out in the country, did you say? A. A few weeks; I am not exactly sure how many now; I keep no diary.

Mr. McPhillips: Q. Now the reservations contained in the deed are set out in paragraph 8 of the Statement of Claim. Then that was your objection? A. That was my objection; yes. The piece of land as set out in the deed is the piece that I wanted.

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Q. In that respect you are objecting to that; in fact you desire the Defendant Company to convey you the land described in the deed? A. Yes.

Q. But of course without reservations? A. But of course without reservations.

Q. As contained in your agreement; and nothing spoken to you about it? A. I knew nothing of it when buying it.

Q. Now after that, what did you do? What was the first thing you did after that, returning that deed and cheque? What next did you have to do with the Railway Company? A. There was nothing done until after I had instructed Messrs. Hunter & Duff. 10

Q. No. You say they were acting for you then of course. But after that I think you went down to the railway office did you not, with Mr. Pemberton? A. Yes, I went with Mr. Pemberton.

Q. Do you remember when that was? A. Late in December

Q. In December of '96? A. Yes of '96; 22nd or 23rd, I think.

Q. My learned friend does not put me to strict proof on this point. We tendered a deed for execution to the Defendant Company. A. That was the purpose that Mr. Pemberton and I went down to the office of the Defendant Company. 20

Q. That was in December? A. Yes.

Q. And tendered a deed without reservations? A. Without reservations, a deed that I was willing to accept.

Q. That was a deed to you of the fee simple? A. Yes. Mr. James Dunsmuir refused to sign that deed.

Q. Did you see Mr. James Dunsmuir? A. I did.

Q. Do you remember what took place; what was said? A. Mr. Pemberton tendered him the deed and wished his signature to it; and Mr. Dunsmuir refused to sign it; he said 30 they would issue no deeds other than deeds such as they generally issued and with the reservations. These may not be his exact words, but the purport of what he said as near as I can remember.

Q. And at that time Mr. Pemberton handed him a deed for execution? A. Yes.

Q. Which was a deed of this land described in Exhibit "T"? A. The same land.

Q. Without reservations? A. Without reservations, yes.

The Court: Have you got that deed. 40

Mr. McPhillips: Yes, Your Lordship. There was a clerical error in this deed, they did not mention the words "heirs and assigns;" but as a matter of fact my learned friend has agreed with the other solicitors that he will admit this tender and I do not understand his objecting on that score.

The Court: It was not any greater interest?

Mr. McPhillips: No, it was a less interest; it would have been a life interest in Mr. Hobbs, if they had executed it. There would be no succession. However, nothing turns on that, I suppose, I understand from my learned friend.

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The deed was put in by Mr. McPhillips, marked Exhibit "X."

Q. That was the form of deed tendered to Mr. James Dunsmuir by Mr. Pemberton, in your presence? A. I believe so

Q. And you have told us what he said in answer? Now, that was all that took place relative to your contract with the Defendant Company, is it not? A. No.

Q. Prior to the commencement of litigation? A. It was.

Q. Then you commenced this action and there was an order made by Mr. Justice Walkem. Just about prior to that order made by Mr. Justice Walkem did you go upon that property? A. I did, yes. 10

Q. What did you find? A. I found the Defendant Company had constructed a slope just outside my line, but the slope ran under my land, and they were then mining and getting out coal from under my land.

Q. Did you go down that slope? A. I did. It was just outside my land, but running under my land.

Q. How far running under your land? A. Well, I went under about 150 yards, 20 as near as I can judge, and I did not go to the end of the slope.

Q. And what were the indications then? A. I understood that they were in about 200 yards

Q. And what was being done there. A. They were mining and extending the slope.

Q. What was being taken out? A. Coal.

The Court: Q. They were mining and taking out coal? A. Yes, my Lord. 30 There were two or three white men and some Chinamen.

Q. Well, was there anyone in occupation of your premises, your land, on the surface? A. Yes, there was some Chinamen living in the cabin.

Q. Living in your completed cabin? A. Yes, and there were several new buildings erected there, log buildings.

Mr. McPhillips: Q. Who were the Chinamen working for and who connected with? A. I understood they were working for the Company, working at the slope.

Q. Well, did you know that they were? A. Well, I don't know, only from their 40 imperfect English in talking to them.

The Court: Q. You understood from them that they were working on the slope? A. Yes, my Lord, I understood from them.

Q. Did you say in the employ of the Defendant Company there? A. I saw a man named—I know him as Sandy Clark, and I understood that he was working for the Company there as contractor or foreman and there were two other white men working with him there.

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Q. Well, now, was work going on while you were there? A. Not actual mining. They were pumping. I understood that the water had gained on them rather fast; and they were then pumping out the slope.

CROSS-EXAMINED BY MR. POOLEY:

Q. I think you told us Mr. Hobbs, that you came here in May, 1889? A. Yes.

Q. And you came from England? A. Yes.

Q. What had been your occupation before you came here? A. Oh, I had worked at different works; sometimes at gas works and sometimes working on a farm. 10

Q. In gas works in England? A. Yes.

Q. Gas works sometimes and on farms? A. Yes. I was raised on a fruit farm.

Q. You were raised on a fruit farm? A. Yes sir.

Q. And after working in the country for some little time and having heard whilst you were working on the line down here on Bonilla Point, that there were lands to be taken up on the Island Railway, you made up your mind to come up here and take some? A. Yes.

Q. The result was that you went to Nanaimo and went out and took up a piece of 20 land there? A. Yes.

Q. You did not go to the Company's office to enquire before you went and took up the land? A. No sir.

Q. From whom then did you get the information about taking up this land? A. From a man who was working for the same contractor as mine on the telegraph line.

Q. On the telegraph line. A. Yes.

Q. And from what he told you, you went up and took up the land. A. Yes.

The Court: Q. A man working on the telegraph line, you say? A. Yes. 30

Mr. Pooley: Q. Did he tell you that he had taken up land himself? A. No sir.

Q. He did not. And that is the only information you had before you went to take up the land? A. Yes, that is the only information I had of that.

Q. You did not read the Act of Parliament? A. No sir.

Q. But you are quite sure that is the only information you had when you went to take up the land? A. Yes, that is the only information I had.

Q. You told us in your examination here just now that when you went up to take 40 up that land you put in an initial post? A. Yes.

Q. Who told you to put in the initial post? A. Mr. Stark advised me.

Q. Then you did see someone besides this man on the telegraph line? A. Not before going up to see the land.

Q. Not before going up to see the land? A. No sir.

Q. I ask you before you took up the land? That was the question I asked you, and you told me you took it up on the representations of this man on the telegraph line.

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I now ask you how it came that you put in an initial post? A. I was advised to put in the post to be used as a starting point.

Q. And you were advised that by Mr. Stark? A. Yes.

Q. By Mr. Stark? That is another person you saw, then? Mr. Stark had taken up land beside there some time? A. Yes, some distance from there, some years previously.

Q. Did Mr. Stark tell you that you did not get the mineral there? A. No, sir.

Q. Do you remember Mr. Stovall? A. I do, well.

Q. Did he tell you in Mr. Stovall's presence that the Railway Company did not dispose of the coal? A. No.

Q. You are quite sure of this? A. I am quite sure.

Q. You are quite sure of that: that Mr. Stark did not at this time tell you, in the presence of Mr. Stovall, that the Railway Company reserved the coal on their lands? A. Yes, sir; I am quite sure.

Q. Or the minerals? A. Quite sure; I never heard it; I never heard anything at all about reservations, either coal or minerals.

Q. How was it, then, that you fixed on this piece of land to take up? A. Because there was more open land there than in any other place that I knew of in the neighbourhood, or that Mr. Stark knew of in the neighbourhood.

Q. In your examination before you said you knew that land was very valuable, and the only good piece of ranching land in the neighbourhood there? A. Yes, sir; that is the reason I took it up, because of these swamps easily cleared out.

Q. How large are those swamps? A. I never measured them; I cannot tell you exactly.

Q. Did you ever go on to the swamps to try them? A. Yes.

Q. And you put a pole down about 30 feet in the principal swamp, the largest one? A. I never did; I never tried it.

Q. You don't know much about it? A. I have walked over it.

Q. It is a peat swamp? A. There is peat in some places, but a good part of it is not peat.

Q. You told us that you went out and you started to build a house? A. Yes.

Q. And when you started to build your house it was in the fall of 1889? A. Yes; the latter part of November or early in December.

Q. Well, you did not take your land up until the 28th of November? A. No, sir; I went up right away afterwards.

Q. Then you were up there in the beginning of December, probably? A. Yes.

Q. And I think you told us you had someone there helping you at the time? A. Yes.

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Q. Who had you assisting you at that time? A. Mr. Whittaker, Mr. Stovall, afterwards the Messrs. Bramley.

Q. That is building the first house? A. Yes, sir.

Q. Well, now, you did not do much with that house; you only put up a few logs?
A. Yes.

Q. And then you left? A. Had to leave it.

Q. Then you went to Nanaimo. Then when you came back again you say you started to build a second house? A. Yes. 10

Q. And then you had whom with you? A. Mr. Murray—

Q. And who else? A. Mr. Stark and his son Abe Stark—Abraham I believe his name is.

Q. Did you finish that house? A. Yes, nearly.

Q. Did you ever quite finish it? A. Never quite finished it, no.

Q. Did you ever put any windows in? A. Yes I did.

Q. Did you take them away again? A. No. 20

Q. Who did? A. Someone has since; I did not take them away.

Q. Did you ever hang a door there? A. Yes.

Q. Is that door there now? A. That same door is there now; it is taken off.

Q. But the windows are not there? A. No.

Q. Did you ever complete the chimney? A. Not quite.

Q. You told us you planted some bushes there? A. Yes.

Q. Where did you plant them. Away to the north of the first cabin. 30

Q. How many did you plant? A. Oh there might have been seven or eight.

Q. What did you have, raspberry canes or what? A. Currants and gooseberries.

Q. Seven or eight; that is the extent of the gardening you did there? A. Seven or eight the extent of the gardening I did there, yes.

Q. You say you left Nanaimo and came down here in 1892? A. Yes.

Q. And never have been back there since. A. I have frequently, but not to live there. 40

Q. You have not been back there to look at it? A. No.

Q. To see if the currant bushes were growing? A. No, I have not used the grounds since, and the undergrowth came up and smothered them.

Q. What did you go back for? A. Several times for a hunt.

Q. You never went back to see whether the initial post was there? A. Yes, I did see it.

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Q. When you put it in what mark did you put on it? A. I don't remember that I marked it at all.

Q. But you are quite sure that you did put one in? A. Yes I am.

Q. You knew enough about—you had heard enough about the land to know that it required an initial post to be put in? A. I didn't know what it was called—I didn't know it was called an initial post at that time.

Q. You have said that you did put in an initial post? A. I did, yes.

Q. You did not know at that time it was an initial post. A. I did not know it was called an initial post.

Q. What size post did you put in? A. Oh, it was not very big, I suppose if it was practically square it might square two or three inches.

Q. You say you came down to Victoria in 1892 and here you remained and went in business. A. Yes.

Q. And you practically abandoned the land, didn't you? A. No sir, never abandoned the land.

Q. Did you try to sell it? A. No, I never really tried to sell it. 20

Q. You never really tried to sell it? A. No sir; I had applications to purchase it, but I made no very serious efforts to sell it.

Q. You stated just now to Mr. McPhillips that when you bought that land you set quite a value on the timber on it? A. Yes.

Q. What class of timber is it? A. There is some good cedar there,

Q. Where does it stand; in the swamps? A. Around the edge of the swamps.

Q. Is there any rock on the land? A. There is considerable rock on the land. 30

Q. There is considerable rock on the land? A. Yes

Q. Is that covered by good trees? A. No; there is a few good firs, but not many, about the rocky portions of it.

Q. Then you bought it as valuable for the few trees growing around the swamps? A. No sir, I bought it for the swamps.

Q. You bought it for the swamps, yes; for the swamp land for cultivation, although you did not know what number of acres is in it? A. Yes. 40

Q. You said you were surprised at the size of the 160 acre piece? A. Yes.

Q. Did you get any other swamp that you did not intend to get? A. Well, it went more than I supposed it would.

Q. You got more than you expected to get? A. Yes, I was afraid it would not take in the last of the four.

Q. Now, you have stated to Mr. McPhillips here that nothing was ever said to you about the reservations of the Company on the land? A. Not prior to my purchase.

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Q. Not prior to your purchase. How soon after your purchase did you know there were reservations there? A. I heard of the Company imposing reservations in the early winter or spring of 1890; I should say in the early spring of 1890.

Q. In the winter or early spring of 1890? A. Yes sir.

Q. Did you tell us when we examined you before the Registrar that you knew it in February, 1890. A. Yes, I believe that is the month.

Q. Not in the winter of 1890—that is February 1890? A. It was February 1890.

Q. That would be the winter of 1889, wouldn't it? A. 1890, February 1890; 10
February is a winter month.

Q. That was the first time you heard that the Company had reserved its minerals?
A. Yes.

Q. And you heard that in Nanaimo? A. I heard that in Nanaimo, at the Grand Hotel.

Q. At the Grand Hotel. I think you gave me the name of the party who told you?
A. Yes.

Q. Well, Mr. Walter Miles? A. Walter Miles, yes. 20

Q. Proprietor of what? A. At that time he was proprietor of the Grand Hotel. He had a piece of land in the near neighbourhood of mine and he was talking about the value of the ranches and he said he had the advantage over me because if there was any coal there, he had his coal; and I said "Haven't I," and he said "No"; and I said "Why not, there is nothing in my papers to prevent it," and he said, "You will see by and by, because the Company reserves the coal."

Q. Then after hearing that did you never mention it to the Company to ask them what the meaning of it was? A. No. 30

Q. You never thought it worth while to mention to the Company? A. No.

Q. But you left the land when you came to Victoria in 1892, and remained here in business? Now in the fall, or September, 1895, do you remember a Mr. Ephraim Hodgson coming to see you? A. Yes I do, well.

Q. Did Mr. Hodgson come to you and ask you if you would like to sell this land?
A. Yes.

Q. In September, 1895, he came and asked you if you wanted to sell, did he not? 40
A. Yes.

Q. Did you tell him that you had left the place and did not intend to go back. A.
No sir.

Q. You did not? A. No I did not.

Q. Did you tell him that you would like to sell it, but you had your brother, who was interested with you, and you would have to see him? A. Mr. Hodgson wanted to purchase and asked me if I would

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Q. Did you say you would like to sell, but you had your brother interested with you and you would have to see him? A. No; I did not say I would like to sell, but I told him I did not care about selling anyhow, but my brother was interested in it with me and I would have to see him.

Q. You asked him to call the next day? A. Yes.

Q. Well, now, did Mr. Ephraim Hodgson return to see you next day with his brother? A. Yes; I believe he did.

Q. Did you make this remark to him then in the presence of his brother: "I don't know as I want to sell, as it is all paid for"? A. No; I did not make that remark, because I knew it was not paid for.

Q. You did not make that remark, and Mr. Hodgson turn around to you and say, "No; you have not; you have only paid \$120"? A. I never said it was all paid for.

Q. You never said it was all paid for? A. No, sir.

Q. Then Mr. Hodgson did not turn around to you and say to you, "No, you have only paid \$120"? A. He knew how much I had paid.

Q. Did he say that to you? A. I don't remember his saying.

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Q. You don't remember his saying that? A. No.

Q. You did not say to him then "That is all right, I have not"? A. I don't remember saying that. I certainly never told him that it was all paid for.

Q. Did you tell him that you would take \$200? A. No I told him I would sell it to him for a \$1,000.

Q. You did not then say to him "I will take \$200? A. No.

Q. And you were to get the \$120 back from the Company? A. No.

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Q. You did not say that? A. No. He offered me \$140; he said he wanted to buy it for a sheep ranch.

The Court: Q. He offered how much, \$140? A. Yes.

Mr. Pooley: Did Mr. Hodgson then say to you "I will give a \$100"? A. Yes, I think he did; but he finally sprung to \$140.

Q. And did you say to him then "The best I will do is \$150"? A. No, I never offered it for \$150.

Q. You never offered it? A. Not for \$150.

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Q. Did you then produce to him the receipt which you held from Mr. Trutch? A. I don't remember whether I ever showed him that or not.

Q. And you don't know then of course if he read it? A. No, I don't know, I don't remember.

Q. And you don't know if he told you after reading the receipt that he would not give you 50 cents for the land, as the receipt did not describe the land on which your cabin stood. A. I know that after I told him that I had not completed the purchase

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that he said he would not give me that for it. He said he would not give me anything; he said what offers he had made were off.

Q. After reading the receipt did he tell you he would not give you fifty cents for the land because the land described in that receipt was not the land on which the cabin was? A. I don't remember his reading the receipt.

Q. You don't remember his reading the receipt, therefore you don't remember his saying that? A. No I don't.

Q. No, that is it. Did you make this remark to him: "You did pretty well on finding the coal out there"? A. Yes, I asked him where it was.

Q. Did you tell him "What a fool I was"—did you say to him "What a fool I am, I knew of coal being there for years"? A. Yes I made some such remark

Q. You made some such remark? A. Yes.

Q. Did he ask you where it was? A. He asked me where it was

Q. Did you tell him "It is right on my place? A. No, I did not.

Q. You did not? A. No; it is over half a mile from my place.

Q. You did not tell him then that you knew there was a seam of coal right on your place? A. No, I did not

Q. You did not? A. No; I did not know it was there.

Q. Did you say to him, "If you will give me \$100 I will go and show you where it is?" A. I did, yes.

Q. And he said he would give it to you if the coal was any good? A. I don't remember his saying so, no; I think I would have likely taken him up if he had.

The Court: Q. You offered to show him where it was for \$100 A. Yes, my Lord.

Mr. Pooley: Q. Did you then say to him, "Look here, you had better give me \$150 for the land, and I will go right down to the office and have it transferred to you now?" A. No, I never offered it for any such money.

Q. You did not say, "You had better give me \$150 for the land and I will go right down to the office and have it transferred to you now?" A. No, I never did.

Q. Did you tell Mr. Hodgson that if the coal was worked out there it would be a good place for a milk ranch? A. Yes.

Q. You did. Did you state also that if the coal was worked out there that your land would be very valuable indeed; you would be able to build 100 cabins on it? A. I don't remember saying that.

Q. For the use of the miners? A. I don't remember saying that.

Q. You don't remember saying that? A. No.

The Court: Q. It would be worth what for cabins for miners?

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Mr. Pooley: Q. What it would be valuable land because we could put up 100 cabins up for the miners? A. You could put 10,000 for that matter.

Q. I did not ask you 10,000, but only 100. Just answer the questions I give you. Do you know a man called Charles Holmes? A. Yes.

Q. He was out surveying the land with you, wasn't he? A. Yes.

Q. Did you tell him that you had the right to the coal on your land? A. Yes.

Q. And he asked you how that was? A. Yes.

Q. And you told him—you produced a paper from your pocket and said, "That¹⁰ is going to give me the coal"? A. Yes.

The Court: Q. When was this?

Mr. Pooley: When the land was being surveyed. And that you had got authority for saying so? A. I don't remember saying I had got authority for saying so.

Q. You don't remember that? A. No; I don't remember that.

Q. But you showed him the paper and said, "This will give it to me." Did you tell him that the papers had no reservations and that you had got authority for saying²⁰ that it would give you the coal? A. I told him that the papers had no reservations.

Q. And that you had got authority for saying that you would have the coal? A. I don't remember saying that.

Q. Well, this was after you saw your solicitors, wasn't it? A. Yes.

Q. Do you think it is possible you may have made that remark to him? A. It is possible I might have but I don't remember it.

Q. It is possible you might have, but you don't remember it? A. I don't remem-
ber that. 30

Q. Now, having got this receipt from Mr. Trutch, you went up and built your two houses, and came down to Victoria. Then on the 4th of April, 1892, you applied by letter to the office stating that you wished to have your land surveyed, didn't you? A. Yes.

Q. A letter of the 4th of April, 1892? A. I believe that is the date, yes, 4th of April, 1892.

Q. And you asked them who were the surveyors in the district? A. Yes.

Q. And they gave you the name of Priest? A. Of Priest and Fry. 40

Q. Now you have told us that you did not have that land surveyed then because you went off to Alberni? A. Yes.

Q. And you did not think it worth while to bother with it? A. I did not say I did not think it was worth while to bother with it.

Q. Is that what you meant? A. No.

Q. Why did you leave it then. A. Because I had notions of using my money otherwise.

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Q. Because you had notions of using your money otherwise. Therefore you did not want to pay the surveyor's fees? A. I did not want to get it surveyed and complete the purchase then.

Q. You did not want to get it surveyed and complete the purchase at that time. Then you received a plan from Mr. Gore telling you what he thought was the position of your land? A. Yes.

Q. You got him that plan on the 6th of April, 1892. Why didn't you at once write back to Mr. Gore and tell him that the land that he had mentioned on that survey was not the land that you required? A. Because I was uncertain of my future movements just then; I thought if I was coming to Victoria shortly I might go and explain to Mr. Gore.

Q. It was not because you thought of giving up the land? No, sir.

Q. Not then at all? The timber was too valuable? A. Yes; I thought so.

Q. The currant bushes were growing? A. I am afraid they were not.

Q. The currant bushes were not dead then? A. I suppose they were.

Q. Dead in 1892? A. Yes.

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Q. And you never replaced them? A. I never replaced them.

Q. What have you done to the land to improve it? A. Not a great deal. I began working in winter and going off in other places in the summer.

Q. Still those bushes grew when you were not there. However, you did not go there, and you took no other steps until you came to Victoria. Now, what time did you come to Victoria? A. I think it was late in the summer.

Q. Late in the summer of 1892? A. I think so; I am not quite sure of the date.

Q. You are quite sure of it? A. I am not quite sure of the date; it was in 1892³⁰

Q. When you came back to Victoria what did you do? Did you go into business at once? A. Not at once; I went to Tacoma and was away 3 or 4 days, and when I came back I went into business.

Q. Why didn't you go and see about this plan as soon as you got to Victoria? A. I went to the office soon after I came back to Victoria.

Q. After you had gone into business or before? A. I am not sure now whether it was before or after. But I know I called on Mr. Gore and told him I had found some of the Company's posts and explained the position of my place.

Q. Did you tell Mr. Gore that the land that he had sent you was not the land that you had built your house on? A. Yes.

Q. You told him that? Did you ask him to change it? A. No; I told him, "This is the land I want," pointing it out on the plan.

Q. You said, "This is the land I want," pointing to the plan. But do you know that that land was not the same land that was mentioned in your application of the 28th

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of November, 1889? A. I did not know at that time; I did not know the exact position according to the compass.

Q. You did not know the exact position at that time. Do you know now that the land mentioned in your application of the 28th of November, 1889, is not the land which has been given to you by the Company, on which your cabin stands. A. I do know now that it is not strictly in accordance with that description; but I know that that description was a good and sufficient description at that time, without any more earmarks given to it.

Q. Well, however your opinion may be, it does not describe the same lands on which your cabin now stands? A. No, it does not. 10

Q. It does not? A. That is it.

The Court: Q. It is not the same as where your cabin is on? A. No, my Lord, the land mentioned in the description, if it bears an extremely literal observance it does not describe the land on which my cabin is built.

The Court: Q. The description in the Company's deed does not strictly include your cabin? A. No, my Lord, that is not it.

Mr. Pooley: No, my Lord; the question I asked you—Does the description in your application that is dated the 28th of November describe the same land as that on which your cabin now stands. The description in the receipt of the 28th of November; not the application. 20

The Court: Q. Now does that or does it not embrace your cabin? A. It does not embrace the cabin, but it describes that land on which my cabin is

Mr. Pooley: Q. It describes the land on which the cabin is. A. It describes the land on which the cabin is.

The Court: Q. If it describes it it embraces it doesn't it? A. No, my Lord; the description says two miles west of Stark's; and if the line is drawn due west of Stark's it would not take in my land; but my land is about two miles in a westerly direction from Mr. Stark's all the same. It is not due west but it is westerly; 30

Mr. Pooley: Q. Mr. Solly came up to your place of business in 1895, didn't he? A. I don't remember him in 1895.

Q. You don't remember 1895? A. Yes, yes, soon after my tendering payment.

Q. Soon after you tendered payment? A. Yes.

Q. Mr. Solly came down to you and saw you at your place of business. A. Yes. 40

Q. And told you or did he tell you that the Company would give you the land which you wanted? A. Yes.

Q. And he told you did he not that the land which you wanted was not the land mentioned in your application? A. Yes.

Q. I mean in the receipt.

The Court: Q. It was not that described in the receipt or the application? A. They are synonymous, my Lord; they both mean the same piece of land.

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Q. Well, Mr. Solly told you the Company would give you the land you wanted; but the land you wanted was not that described in the receipt or application; and the receipt and application are identical? A. Yes, my Lord.

Q. Afterwards Mr. Solly wrote you a letter telling you that the Company would give you the land on your paying for it? A. Yes, sir.

Q. And that as soon as you sent the money a deed would be prepared and forwarded?

Mr. Pooley. Q. Now, you have mentioned here your interview with Mr. Trutch¹⁰ when you first went to see him? A. Yes.

Q. Now, did Mr. Trutch tell you then that the minerals of the Company were reserved? A. No.

Q. You say that Mr. Trutch told that you were to pay the \$120 down and the balance in 3 or 4 years? A. In one, two and three years.

Q. But the statement you made to the Judge when the question was asked you, in three or four years, and I say that does not conform to the receipt; the receipt is one, two and three years? A. One, two and three years. ²⁰

The Court. Q. Did he say, one, two and three years? A. Yes; he said one, two and three years.

Mr. Pooley. Q. And then Mr. Trutch wrote out the receipt which you say you have had in your possession ever since? A. Yes.

Q. Until you handed it to your solicitors? A. Yes.

Q. You say you went into the office and saw Mr. Solly on or about the 16th of February, I think, in 1896? A. Yes, I think it was the month of February, 1896.

Q. And you asked him then about--was it on that occasion or was it in November³⁰ that the conversation took place about paying for the land? A. November, 1895.

Q. And then you let Mr. Solly look at your receipt? A. Yes, he asked me to look at it and I allowed him.

Q. You have had that receipt photographed, haven't you? A. Yes.

Q. When did you have it photographed? A. It was just about the time of the commencement of the litigation

Q. The receipt became valuable then? A. Yes, I wanted to keep a duplicate in⁴⁰ case anything might happen to it.

Q. And you did not consider it of much value before this litigation commenced? A. Oh yes, I did; it was my only evidence of having purchased the land.

Q. But you did not consider it of sufficient value to have it photographed? A. No.

Q. You did not know until then that you had the coal? A. It was always in my possession until then, and then it was going into other people's possession and I wished to have a copy for my own use.

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Q. Did you have it photographed before you handed it to the solicitors or was it photographed afterwards? A. I am not quite sure of the date of it.

Q. Did you get it photographed? A. I did.

Q. Where did you get it photographed? A. At the Imperial Studio, Eyres.

Q. Where, in Victoria? A. In Victoria.

Q. And you don't know the date it was done? A. I am not sure of the date it was done.

Q. But still this receipt all at once became so valuable that it was worth photographing? A. Yes. My Lord, my idea for getting that photographed was not so much for the value of the receipt as the fact that I wanted a copy for my own use after I had let it go.

Q. Couldn't you make a copy of it? A. Yes, but I wished to show an exact copy, and a photograph of a camera does not lie.

Q. Now, I asked you the question the other day and I ask you the question now; did you ever see a conveyance of the Railway Company of any of their lands up there before you took up this land? A. No, I don't remember ever seeing a conveyance of the Company's until I had this one sent me from the company.

Q. Until when. A. Until this one was sent me from the Company.

Q. Do you swear that you never saw a conveyance before you took up this land? A. Yes.

Q. You do? A. I do swear that I don't remember ever having seen one until I saw that.

Q. You have sworn positively you had not seen one? A. Yes.

Q. You are positive of it? You received certain notices from Mr. Solly to pay up the amount due, did you not? A. Yes.

Q. And when you called at Mr. Solly's office in November, 1895, and wanted to go on with the purchase of the land, did Mr. Solly call your attention to the fact that he had sent these notices to you? A. Yes.

Q. And did you tell him that you had never received them? A. I do not remember telling him that.

Q. Did Mr. Solly tell you that you must have received them, because they never were returned through the post? A. I remember his telling me that he had sent them, but I don't remember what my reply was.

Q. Now, when you went into Mr. Gore's office to see him about the land, when you came back in the autumn of 1892, did you tell Mr. Gore that the plan that you had received from him did not cover the land you wanted? A. I don't remember telling him that; but I remember telling him that I had found some posts which enabled me to tell nearly where my land was on the map.

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Q. And you asked him to change the land from the sketch he had given you to a piece higher up? A. No; I don't remember asking that

Q. You don't remember asking him that? A. No I showed him the piece of land on which my cabin was.

Q. But you don't remember asking him to change that land because it was not the land you wanted? A. I don't remember asking him to change it.

Q. And the reason you did not pay for this land was you wanted to use your money in business? A. Yes. 10

Q. Wasn't it rather speculative when the money was due for the land? A. No, I did not consider it that way.

Q. Didn't you know that the Company could not compel you to pay for this land if you chose? A. Yes, they could compel me to pay for it.

Q. They could compel you to pay for it? A. I suppose they could.

Q. You suppose they could? A. Yes.

Q. Do you suppose they could compel you to pay for this land? A. I suppose they could. 20

Q. Very well Now you have recollected a meeting here when you went down to Mr. Solly's office in February, wasn't it after he asked you to come down to his office and talk the matter over; you say you recollect it? A. Yes, I have a slight recollection of that now.

Q. Where was it that Mr. Solly offered to give you a plan of this piece of land that the Company would give you? Was it at your store? A. I am not sure whether it was at the store or at the Company's office. I remember him saying that they had located the cabin; and I asked him for a tracing. But I am not sure now whether it was at the inter- 30 view at the Company's office, or whether it was in my store.

Q. And you state now, Mr. Hobbs, that you did not know at any time that there was coal on the land until the E. & N. Railway struck it there with the extension? A. I did not know that there was any coal on my land or under my land until after the slope was started there; but I did know there was coal in the near neighbourhood.

Q. Yes. Now you say you went on this property before Mr. Justice Walkem made his order in January last, and that you went down the slope 150 yards? A. Yes, as near as I can judge, 150 yards 40

Q. 150 yards? A. Yes.

Q. Under your land? A. Yes.

Q. And then you did not go to the end of it? A. No, I did not go to the end of it then.

Q. Who measured it for you? A. No one.

Q. Guess work? A. Guess work.

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Q. You stated to the Judge positively, 150 yards, and then didn't go to the end of it? A. I believe I said about 150 yards.

Q. Under your land about 150 yards. A. Yes.

Q. And you understood it was 200 yards? A. Yes.

Q. And when you got down that distance you had not got to the end of it? A. No.

Q. But that is merely guess work; you did not measure it? A. I did not measure it, no. 10

Q. Now you say when you saw Mr. Solly about the land in his office, that Mr. Solly said to you, "If you want to go to law I think we can accommodate you?" A. Not exactly, Mr. Pooley. "If you have any money to waste in law, I guess we will meet you."

Q. "If you have any money to waste in law, I guess we will meet you?" A. Yes.

Q. You say Mr Solly said that to you in his office? A. Yes. After my seeing that I thought I could compel the Company to carry out the arrangements. I naturally felt very indignant at not being allowed to complete the purchase, and at the idea of losing the land.

Q. At this time the currant bushes were dead? A. Oh, they were dead long ago.

RE-EXAMINED BY MR. MCPHILLIPS.

Q. My learned friend asked you about the explanation of this description in the receipt, which is Exhibit "C." When you were speaking about the description contained in that receipt, what is it that has arisen in respect of the description? What is your explanation when you say that it is not the same land? A. I understand that it is the land which I described? 30

Q. You understand it to be the land you described? A. Yes; the land which I went on.

Q. The land which you described in your application? A. I understand that the land I described is the land that I am on. But I know now for a fact that a line drawn due west—

Q. But who is raising this point about a line drawn due west? A. Not I, of course. 40

Q. You are not raising it? A. No; I had no compass when I made out that description.

The Court: "I understand that the land described in my application was"—

Mr. McPhillips; Q.—as set forth in the receipt? A. As set forth in the receipt; yes.

Q. Is it? A. Yes; that is the land which I went on, which I described to Mr. Trutch; and he made out the receipt from my description.



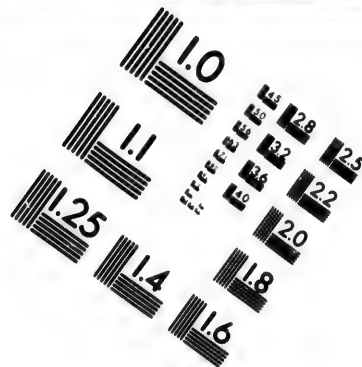
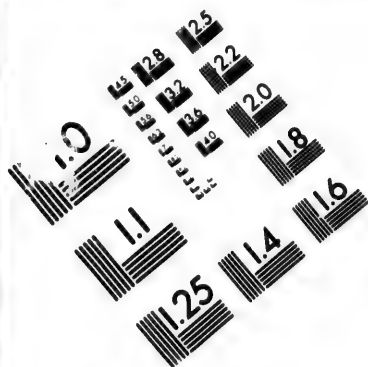
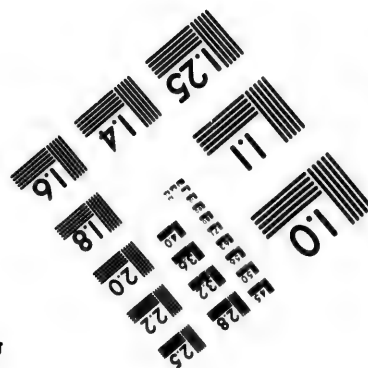
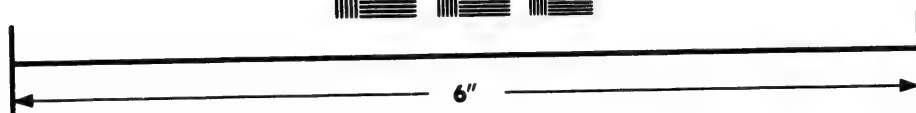
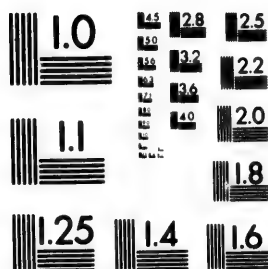


IMAGE EVALUATION TEST TARGET (MT-3)



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Q. But since then something has been raised—some question has been raised; who has raised it? A. The Defendant Company.

Q. The Railway Company have raised some question about it? A. Yes.

Q. And what is it? A. Well, as far as I can make out, they maintained that I applied for the land due west of Stark's.

Q. Due west is not in the receipt, however? A. Due west is not in the receipt; that I know.

Q. Not in this agreement of the 28th of November? A. I say west, and it is in a ¹⁰ westerly direction.

Q. Well, as a matter of fact, it is due west of land of Stark's, is it not? A. It is due west of some of Stark's land.

The Court: Q. When you are speaking about this you have got the description in the conveyance, and you have got the description in the application. Now what am I to understand you about this land, about some of it being due west of Starks, the land described in the receipt or in the deed? A. It is all west.

Q. It is only the question of due west? A. Yes, my Lord. ²⁰

Mr. McPhillips: Q. But the Defendant Company are now laying stress on its being due west; is not that the point? A. Yes.

Q. But, even dealing with due west, it is due west of some of Stark's land? A. Yes.

Q. All this land is due west of some of Stark's land? A. Yes.

The Court: Q. I do not see how this arises. Whatever be the description, both parties are one as far as that is concerned. Whether there be a difference or whether there is not is immaterial; the point is whether the mineral is included or not? A. Yes, my Lord. ³⁰

Q. As far as the plaintiff is concerned he says it is immaterial whether it is west or due west.

Mr. McPhillips: My learned friend laid stress on that; I don't know what he is going to raise.

Mr. McPhillips: Q. You say you had no compass? A. I had no compass, no way of measuring; it was a general description and I think now as good a description as any one not well learned in the woods, that anyone could go and get even to-day.

Q. Even to-day you think it is as good a description as could have been given? A. ⁴⁰ Yes.

Now what was the condition of the country just about there that you had to go through; west of Stark's? Was it bushy country? A. It was all wild, bushy country.

Q. The land west of Stark's is all bushy country? A. Yes, and is to-day.

Q. What kind of a trail? A. An old trail, deer or elk trail, winding out from Stark's place. It was kept open mostly by Stark's cattle going from one of these meadows to the other. And it ran that way. No logs were cut out or anything.

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Q No logs were cut out? A No.

Q And this description: that the Defendants put in the deed, is the land that you wanted from the first? A Yes.

Q And the land on which you built your cabin? A And the land on which I built my cabins, both of them.

Q And what you wanted? A The same land I wanted all the time. The land I went on first and I have never been on any other land.

Q And you have never had but one agreement with the Defendant Company? 10
A That is all.

Q My learned friend asked you about when Mr. Solly came to you and he said you wanted some land or other; was it this land that he pointed out to you? A No; but the company had all along I suppose—I gathered from conversation with the Company's officers that they supposed all along that the land I wanted was due west from Stark's.

Q They had been working on the assumption that the land had been absolutely due west? A Due west, yes. 20

Q Of some point in Stark's land

The Court: Q Does the description in the deed go on that assumption? A No, my Lord.

Mr McPhillips: Q Now you said to my learned friend, you said something to Mr Hodgson that if you were given \$100 you would show him some coal. What did you mean by that and where would the coal be? A The coal is over a half a mile south of my place.

Q It is not any coal on your place? A It is not any coal on my place. 30

Q You did not think there was coal there? A I did not think there was coal there at all until the Company started that slope there.

Q You never had any idea there was any coal on your land, claimed by you, until the Company started that slope? A No; I did not.

Q And the litigation commenced and Mr. Justice Walkem made his order? A I had no idea that there was coal on it. I heard that there was coal on the E. & N. Extension, and I thought that maybe my land might be of a little value there; but I had no idea of coal being under it. 40

Q Now, my learned friend asked you about this slope; it went 150 yards, you think, or about 200 yards. Now, it does not commence on your land? A No; the mouth of the slope is outside of my land.

Q And it runs down under your land? A Yes.

Q And, speaking roughly, you thought it was 150 yards? A Yes. I think so yet. I walked down there; it was only a gradual incline, and one can walk down fairly easily.

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Q. Who did you understand Mr. Hodgson to be when he came to you? A. I had met Mr. Hodgson in Nanaimo; I was slightly acquainted with him, and I had heard since that he had taken up land somewhere in the same neighbourhood, over by Mr. Stark's, there, but I never thought seriously about selling the land. He spoke in a very off-hand manner that he had some land near there, and thought it would be good for sheep. And at the same time I knew coal had been found in the neighbourhood, and did not think he was in earnest about his sheep.

Q. You treated Mr. Hodgson as a man to whom you had to talk, but to whom you had not to be particular about what you told him? A. That is just the matter. 10

Q. You thought he was on a fishing expedition? A. I thought he was on a fishing expedition; and he has been around fishing since then, but he did not catch.

EXAMINED BY THE COURT.

Q. Mr. Hobbs, how long were you building or putting up this cabin which you erected to the extent of five logs, which you were speaking about? A. We were, I suppose, a couple of days getting the logs and getting them to the place.

Q. How many of you? A. There were three of us; about three days getting out the logs and erecting a little green bough shelter to sleep under. 20

Q. Was it three days for the three of you? A. Yes.

Q. And then what other time? A. Then one day in attempting to raise it.

Q. The same three? A. No, my Lord; Mr. Bramley and Mr. Ralph Bramley and Mr. Ezra Bramley were there then.

Q. That would be five of you? A. I am not sure about Stovall being there then at the time we were raising it. I am not quite sure about Stovall being there at the raising. 30

Q. Six of you one day. Then what else? A. The Bramley brothers returned home that evening, my Lord, when the snow came so bad; and they did not come out again.

Q. That was all the work that was done on the cabin so far? A. Yes.

Q. Then in erecting the second cabin, how many days? A. I forget just the time we were occupied, but Mr. Murray helped me until we had the rafters up.

Q. How many of you were getting out the logs? A. Mr. Murray and I got out the logs for the second cabin. 40

Q. About how long? A. I forget, my Lord, I don't remember about how long it took us.

Q. Three or four days? A. Yes, I think it would perhaps, I don't know.

Q. A week getting out the logs, and how long raising it? A. We put up the walls in a day.

Q. You and Mr. Murray? A. No, my Lord, Louis Stark, his son Abraham Stark, and Murray and I.

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Q. How many days were you raising it? A. Put up the logs in one day.

Q. And what else? A. And Murray and I put on the rafters; got them out; peeled them and put them on.

Q. How many days did that take? A. It is hard to remember, my Lord, eight years ago, and I don't remember just how long it was.

Q. How many men, do you remember? A. Only two of us.

Q. Was it a day's work getting them out and a day's work putting them on? A. Yes, I guess there might have been, at that time. 10

Q. Did you do anything else to it? A. Cut out the doorway and windows, split some shingles—shakes.

Q. That would represent how many days' work for the two of you? A. We were there for several weeks altogether.

Q. Several weeks. Three weeks? A. Yes. I expect three or four weeks.

Q. And that made the house habitable? A. That made the house habitable, yes.

Q. I thought I understood you to say that as regards the first cabin you put in the windows? A. No, my Lord. 20

Q. Only the logs, the few logs? And no door cut? A. No.

Q. And the plants were put in there? A. They were put in before, they were put in at the time just before building the other cabin, the first cabin.

Q. That did not take you long to put them in? A. They were only hilled in temporarily, and they were put in at the foot of a windfall tree, a tree had been blown over, and I put them in there temporarily and they afterwards got smothered up.

Q. That would not take you over a day? A. No. 30

Q. And the cost of that? A. They cost nothing they were given to me by Mr. Stark.

Q. What is the value of land around there irrespective of minerals, in that section? A. I do not know, my Lord. This was sold to me for \$3.00 an acre.

Q. What is the present value of land irrespective of minerals? A. I have not heard of any prices. I cannot form an idea, my Lord.

Q. You don't know what the value of agricultural land is there at all? A. No, I have never heard of any sold in the neighborhood. I know it takes considerable labor to clear land; it is worth from 100 to 150 dollars an acre to get it in a fit state for cultivation. 40

Q. Is this land pretty thickly timbered? A. Yes, it is pretty thickly timbered outside of the swamp.

Q. And what is the area of the open land—swamps—or open land? A. I have heard it variously estimated from 25 to 40 acres.

Q. Outside of the swamps? A. That is of the open swampy land on that place.

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Q. And the rest of it is timbered heavily? A. Is timbered and rocky; where it is not heavily timbered it is bare rocks.

Q. And what is the class of timber? A. Principally fir and some cedar around some of the swamps.

Q. Is it large fir? A. No, my Lord, not very large.

Q. Not logging fir? A. No, my Lord.

Q. Not merchantable timber. A. Not merchantable timber, no.

Witness stands aside.

10

RALPH BRAMLEY, being duly sworn, testified. Examined by Mr. McPhillips:

Q. Your name? A. Ralph Bramley.

Q. And you reside where? A. Cranberry District.

Q. To come right to the point—very near to the land in dispute isn't it? A. Pretty near.

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Q. How close? A. Oh about two miles away I guess.

Q. Now you know the plaintiff, Mr. Hobbs? A. Yes.

Q. When did you first meet him? A. Well, I could not tell you that—not to the date.

Q. Would it be the time when he came on to this land in question? A. Yes.

Q. You saw him at that time. A. Yes.

Q. And do you know anything about what he did on this particular land? A. I know he put up a little—started to put up a cabin.

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Q. You know he started to put up a cabin? A. Well, we helped him a little.

Q. You helped him, you and your brother? A. Yes.

Q. Well, now you have been on the land have you not? A. Yes.

Q. Around it very much. A. A few times around there.

Q. And you know where this cabin that he has been speaking of in his evidence is built? A. I know where both of them are.

Q. You know the one where he started and the one that he completed—that was in 1889? A. I don't know; I cannot tell any year; I know it is there all right.

Q. It is six or seven years ago anyway? A. I could not tell you.

Q. However, you say he started to build one cabin and completed another? A. Yes.

Q. Do you know why he stopped building the first cabin? A. Well, I don't know exactly why he stopped; but I know he stopped that day we were there on account of the snow. And we never went any more.

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Q. How far is the new cabin from the first one? A. Oh, about three hundred yards, I guess.

Q. Three hundred yards. Where; north, south, east or west? A. I could not tell you the direction; I am no surveyor.

Q. Which do you think? A. I don't know; I have got no thinking about it.

Q. You don't know? A. No.

Q. How long had you been a resident within two miles of this particular property, before you saw Mr. Hobbs? A. I have lived up there about twelve years altogether, 10 about Nanaimo.

Q. How long had you been in that neighbourhood before Mr. Hobbs came? A. About four years anyway.

Q. Have you any land in that neighbourhood? A. Yes.

Q. You have land in that neighbourhood? A. Yes.

Q. You had it before Mr. Hobbs came? A. Yes.

Q. Who had you got your land from? A. We got the title deed from the E. & 20 N. Ry. Co.

Q. When did you take it up? A. We took it from the Government when we first took it.

Q. You were one of the pre-emptors? A. I don't know what you call it; we took it up from the Government.

Q. That is, you took it up at a dollar an acre. A. Yes.

Q. And, of course, under that sub-section in the Act, you were not entitled to any coal. Did you have any talk with Mr. Hobbs about the Defendant Company reserving 30 coal? A. I don't remember.

Q. Do you know that this land has been surveyed since—that Hobbs claims? A. I could not say that.

Q. You don't know whether it was surveyed or not? A. I do not.

Q. Do you know how long after the first cabin was abandoned that the new one was erected? A. No.

Q. You know of the new one being erected? A. Yes; I know there is two there.

Q. Did you assist in it? A. No. 40

CROSS-EXAMINED BY MR POOLEY.

Q. Do I understand you, Mr. Bramley, to say that you did not assist or did you assist to build the first cabin? A. Yes, sir; the first cabin.

Q. You assisted to build the first one? A. Yes.

Q. You did not assist on the second one? A. No.

Q. You knew Mr. Hobbs pretty intimately then? A. Oh yes.

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Q. But you don't recollect having any conversation with him about coal? A. Oh, I have had a little about coal; I heard him say that he knew where there was coal.

Q. You have heard him say that he knew where there was coal? A. Yes.

Q. When? A. Well, I don't know for sure when it was.

Q. You cannot tell for sure when it was? A. No.

Q. Was it before he came to Victoria? A. Oh, I think it is since the E. & N. started; I think so; I would not be sure.

Q. Did he tell you where he knew it was? A. He did not tell us where—he said¹⁰ he knew there was some coal around there somewhere.

Q. Did he tell you it was on his own land? A. I would not be sure of that.

Q. Did he tell you that he knew of any coal being there whilst he was living there?
A. I don't think so. I don't think it was at the time he was living there.

Q. You don't remember that? A. No.

Q. Did you see the second house completed? A. Oh, I have seen it; I have been around there hunting—that is all.

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Q. Was it all well finished up? A. Not very good.

Q. Not very good? A. No.

Q. Was it weather tight? A. I don't know; it might be.

Q. Did you go inside it? A. Yes, I have been inside

Q. Could you tell whether it was weather tight or not? A. I never took particular notice.

Q. Were the windows in good shape? A. Not very; not when I was there. I³⁰ don't remember being there when the Plaintiff lived there.

Q. You don't remember being there when he lived there? A. No.

Q. When did you go there first—do you know? A. I don't know that.

RE-EXAMINED BY MR. MCPHILLIPS:

Q. Your brother, Ezra Bramley, where is he? A. In England

Q. He is at the present time in England? A. Yes.

Q. He helped Mr. Hobbs to build his cabin, did he not? A. Yes.

Witness stands aside.

40

ALLAN G. MURRAY, being duly sworn, testifies. Examined by Mr. McPhillips:

Q. You know the Plaintiff in this action, Mr. Hobbs? A. I do

Q. When did you first meet with him? A. In the spring of 1890.

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Q. What did you do with him? I mean did you enter into any business relations with him? A. Yes, I went in partnership with him clearing land.

Q. Well, I believe in doing that you, went somewhere to get some tools? A. Yes.

Q. Where did you go? A. We went to Mr. Hobbs' ranch.

Q. You went to Mr. Hobbs' ranch. Now just tell the Court where you went to?

A. Well it was probably about two miles from Mr. Stark's ranch. We went to Stark's ranch first by buggy and walked from there. 10

Q. That is Mr. Hobbs and you did? A. Yes.

The Court: Q. Two miles from Stark's ranch? A. About two miles from Stark's ranch. Yes.

Mr. McPhillips: Q. It is about two miles? A. I think so.

Q. In which direction? A. In a westerly direction.

Q. And what did you find? You came to some stopping point, what did you do? A. We got to Mr. Hobbs' cabin or part of a cabin. 20

Q. You came to part of a cabin? A. Yes.

Q. That was the first cabin? A. Yes, the first cabin that was on the place.

Q. And what did you find there? A. We found his tools there, which we came for. We came for tools and we found them there.

Q. Where were they? A. They were around the house, scattered around one part and another; scattered within a few feet of the house. That was the house that was about five or six logs high, probably.

Q. Now, did you see any evidences or were there evidences of anybody being 30 in possession of the premises there? A. Of any other party?

Q. Did you see anything else showing that a man had been living there? A. Oh yes; a grindstone was set up; he took me down and showed me a few fruit bushes that he had got from Stark and planted there.

Q. And what else? Anything else? A. No, that was all I could see.

Q. Do you remember noticing any posts defining—indicating that they were driven in or anything of that kind there? A. At this time, no.

Q. Now what did you do after that? You worked all summer with Mr. Hobbs? 40 A. I worked all summer at Nanaimo with Mr. Hobbs.

Q. And what in the fall did you do. A. I returned to this place with Mr. Hobbs.

Q. That was the fall of 1890? A. That was the fall of 1890.

Q. Returned to whose place?—Where the cabin was four or five logs high with the Plaintiff? A. Yes.

Q. What did you do then? A. We commenced to erect a house again in a different place.

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Q. Do you remember what month that was about? **A.** I don't know just what month it was—it was after the summer's work was over.

Q. Describe the other place in reference to the one that was four or five logs high?
A. It was probably 300 yards south of it I think.

Q. You started to build a house about 300 yards south of the other one? **A.** Yes; in a southerly direction, of course.

Q. What did you then; how much work did you do? **A.** How long did you remain there? **A.** I remained there probably three or four weeks. 10

Q. Working with the plaintiff? **A.** Working with the plaintiff.

Q. And during that time what did you accomplish? **A.** We built the house and roofed it with shakes; split everything, of course; it was all hand work.

Q. Built the house and roofed it, and cut out the doors and windows? **A.** Yes; made it habitable.

Q. Put in doors and windows? **A.** No; the door was not put in when I left it.

Q. No doors or windows? **A.** There was no other doors or windows put in at the time I left. 20

Q. Were you on this land after that? **A.** Yes; I was on the land after that several times.

Q. At this time you were on the land, did you go around the boundaries of it, or anything of that kind? **A.** Well, I have been around it a good deal hunting with Mr. Hobbs.

Q. Did you see any posts then? **A.** Yes.

Q. What posts did you see? **A.** I saw the post probably within 150 yards from the first cabin. 30

Q. About one hundred and fifty yards from the first cabin you saw a post? **A.** Yes.

The Court: **Q.** A post or posts? **A.** One post, sir.

Mr. McPhillips: **Q.** In what direction? **A.** It will be in a northeasterly direction, sir.

Q. In a northeasterly direction; do you know what post that was? **A.** I do not. 40

Q. Now, I believe later on in the winter you went out to Mr. Hobbs' place? **A.** I did.

Q. The winter of 1890 and 1891? **A.** The winter of 1890 and 1891.

Q. What did you find then? **A.** I found the cabin, the door in it, and windows in it, and Mr. Hobbs living there.

Q. You found the building complete? **A.** About as much as a bachelor's cabin would be in the woods.

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Q. The winter of 1890 and 1891? A. It would be 1890 and 1891. The winter extends over, I should think, sometime between December and February.

Q. Have you been out there again? A. I have been out there again.

Q. How soon after that was it? A. I don't know just how soon; I have been out there several times on a visit; not to stay.

Q. Not to stay; you were going out to see him, is that it? A. Yes; I went there once when Mr. Hobbs was not there.

Q. You found him away? A. I knew he was away when I went. I knew he¹⁰ was in Nanaimo. I went out and stayed in the house two days.

Q. You stayed in the house two days, when Mr. Hobbs happened to be in Nanaimo? A. Yes.

Q. The next time you were on the land, was I think in April, 1896, some time when the surveyor came out, Mr. Priest? A. Yes, some time in March or April, 1896.

Q. Well, were you there when Mr. Priest came out to survey the land? A. I was.

Q. Do you remember doing anything in connection with a survey of the land? A²⁰ Yes, I helped to chain the place.

Q. You acted as one of the chainmen? A. One of the chainmen, yes.

Q. For Mr. Priest? A. For Mr. Priest.

Q. Therefore you went all around the property? A. I went all round the property.

Q. Now, what property did you go around? Now, speaking of the house that was built, where was the house with reference to the boundaries that you went around with the surveyor? A. I should think the house would be pretty near the centre of it, the second³⁰ house.

Q. The second house? A. The second house would be pretty near the centre.

The Court: Q. That is of the land that you went around in company with Mr. Priest? A. Yes.

Mr. McPhillips. Q. And chained? A. And chained.

Q. Now, speaking of these posts, you had seen—what position does it bear with respect to any of the boundaries of the property? You say you had seen a post before the survey; the post was inside the survey too? A. It was inside the survey too.⁴⁰

Q. About what distance from the first house? A. About one hundred and fifty yards from the first house and about one hundred yards from the survey line.

Q. From which line of the survey? A. The north line.

Q. That post that you saw before the survey would be about one hundred yards from the north line of the survey. A. Of the survey.

Witness stands aside.

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Mr. McPhillips: Now, my Lord, if my learned friend does not admit this documentary evidence—I do not think there is any contest about it—I will have to go on and prove it. In the first place exhibit A that is admitted, there is no proof necessary with respect to those.

The Court: I suppose all the documents that have gone in are admitted?

Mr. Pooley: I have not objected to any of them.

Mr. McPhillips. Then I do not need to go on and make technical proof?

The Court: No, there is no dispute about the handwriting or signatures.

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Mr. McPhillips: Now, I propose, my Lord, I propose to put in some examination evidence. First, of Mr. John Trutch, Land Commissioner of the Company. What I propose to put in is all of page 1; page 2, lines 1 to 21, inclusive; page 3, line 7 to end of page; page 4, line 19 to end of page; page 5, lines 1 to 16, inclusive; commencing at the last line of page 5, all of page 6; page 7, line 6 to end of page; all of pages 8, 9, 10, 11 and 12, page 17, line 10 to end of page; page 18, lines 1 to 10 inclusive; page 18, line 17 to end of page; page 19; page 20, line 12 to end of page; page 21, lines 1 to 23 inclusive; page 23, line 23, to end of page; page 24, lines 1 to 22 inclusive; page 31, commencing at line 5 to end of page; pages 32 and 33; page 34, lines 1 to 13 inclusive;²⁰ all of page 35; pages 36, 37, 38; page 39, lines 1 to 21, inclusive.

IN MR. SOLLY'S EXAMINATION:

All of page 46; page 47, lines 1 to 25 inclusive; all of pages 48, 49, 50 and 51; page 52, lines 1 to 5 inclusive; all of pages 53, 54, 55, 56, 57 and 58; page 59, lines 1 to 18 inclusive; page 62, line 26 to end of page; all of page 63; page 64, line 1 to 12 inclusive; page 66, line 4 to end of page; page 67, lines 1 to 10 inclusive; all of pages 73, 74, 75 and 76; page 77, lines 1 to 7 inclusive; page 79, lines 8 to 21 inclusive; page 80, line 10 to end of page; all of page 81; page 82, lines 7 to 19 inclusive.

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IN MR. DUNSMUIR'S EXAMINATION.

All of pages 1 to 5 inclusive; page 6, lines 2 to 4 inclusive and line 19 to end of page 6; all of page 7; page 9, line 12 to end of page; page 10, line 1 to 12 inclusive; page 11, line 13 to end of page; page 12, line 15 to end of page; page 13, line 1; also line 20 to end of page 13; page 14, lines 1 to 9 inclusive; page 14, line 24 to end of page; all of page 15; page 16, lines 21 to 25 inclusive; page 17, lines 11 to 15 inclusive; page 20, lines 7 to 19 inclusive.

IN MR. T. S. GORE'S EXAMINATION.

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All of pages 1 to 4 inclusive; page 5, lines 1 to 25 inclusive; page 9, line 20 to end of page; all of pages 10 and 11; page 20, lines 9 to 15 inclusive;

CHARTRES C. PEMBERTON, being duly sworn testified. Examined by Mr. McPhillips:

Q. Your name? A. Chartres C. Pemberton.

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Q. You are a barrister and solicitor of this Court? A. Yes.

Q. And you are the solicitor for the Plaintiff in this action? A. I am.

Q. I understand you attended at the office of the Defendant Company in December, last? A. On the 23rd of December last.

Q. What year? A. 1896. I attended at the office of the E. & N. Railway Company and saw Mr. Dunsmuir and tendered this deed for signature.

Q. To Mr. James Dunsmuir. A. To Mr. James Dunsmuir.

Q. The Vice-President of the Defendant Company? A. Vice-President of the¹⁰ Defendant Company.

Q. And you found him in his office? A. I found him in his office.

Q. On Store street? A. On Store street.

Q. What took place there? A. I offered him this deed for signature (Exhibit "X").

Q. You tendered what is called Exhibit "X" here? A. Yes. I told him it was a deed for signature of the land comprised in the agreement of the 28th November, 1889,²⁰ and I asked him to execute it.

Q. An agreement with whom? A. With Mr. Hobbs.

Q. The Plaintiff? A. Yes, Mr. Hobbs was with me.

Q. Mr. Hobbs was present with you at the time. A. Yes.

Q. And what did he say? A. He refused to sign it, saying that they would not sell anything but the surface rights. I then asked if they would give any deed to the land, and he said only their own deeds, and I said, "With all the reservations?" and he said "Yes." And I said, "You won't give any other?" and he said, "Not a one." And³⁰ that is about all that took place. I then left. At the time I tendered this I did not notice that those words were not in there.

Q. The words that have been called to your attention, that is, the "habendum"; what words? A. The words "his heirs and assigns" left out in the habendum. They are in the grant, but not in the habendum.

Q. That is a clerical error? A. Of the copyist in typewriting. They were in there—I saw them afterwards.

Q. You noticed it yourself and pointed it out to me? A. Yes. 40

CROSS-EXAMINED BY MR. POOLEY:

Q. Where did you get this description of the parcels from Mr. Pemberton? A. I think I got it partly from the Land Registry Office.

Q. Partly from the Land Registry Office? A. Yes.

Q. And you found there—you call this in the deed, Lot 6, Douglas District, and Lots 10 and 11, Cranberry District? A. Yes, I think that is the way it is in the Land Registry Office, I think when I searched there.

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Q. Lot 6, Lots 10 and 11? There are no such things as Lots 10 and 11, Cranberry District? A. I thought I saw them in the Land Registry Office on the map there.

Q. You saw the Defendant Company's plat? A. No.

Q. Attached to the deed? A. No, we did not have the deed.

Q. However, you called them Lots 10 and 11, Cranberry District?

Mr. McPhillips: Q. It is part of Lot 6, Douglas District, and part of Lots 11 and 12, Cranberry District.

Witness stands aside.

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ELIJAH PRIEST, being called and duly sworn, testified. Examined by Mr. McPhillips:

Q. Your name, Mr. Priest? A. Elijah Priest.

Q. What is your occupation? A. Provincial Land Surveyor.

Q. You are a duly qualified Provincial Land Surveyor? A. Yes.

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Q. You practise in the Province of British Columbia? A. Yes.

Q. You know the plaintiff, Mr. Hobbs? A. I do.

Q. Did you do any work for him? A. I did some work for him out in Cranberry and Douglas Districts.

Q. When? A. In April, 1886.

Q. Now what were the circumstances of your being instructed to do some work for him? How did it occur? Who came to you? A. Mr. Hobbs came to me and asked me if I could go out and survey his 160 acres for him.

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Q. Yes; and did he show you anything? A. He showed me a plan that he had from the Railway Company.

Q. Was it this plan that you have reference to (Exhibit "I")? (handed to witness). A. Yes; I think that is it; I think he showed me both of them.

Q. Here is the other (Exhibit "F")? (handed to witness). A. Yes, I think he showed me two of them.

Q. Exhibits "F" and "I"? A. He told me that that was the latest he had received from the Railway Company.

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Q. That is Exhibit "I" was the latest he had received from the Railway Company? A. Yes.

Q. That "I," that is the smaller one, that was the latest received from the Railway Company. A. Yes.

Q. Now what did you do after being shown those? A. I found my starting point

Q. You went on the ground? A. I went on the ground with Mr. Hobbs.

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- Q. What ground did you go on? A. The ground where he had a cabin built.
- Q. Did you go to the house? A. I went to the house that Mr. Hobbs had built.
- Q. Had you ever seen that house before? A. Yes, I had seen the cabin before.
- Q. How long before do you think? A. Some time in 1894.
- Q. You had been over the ground then in 1894? A. Yes.
- Q. Did you meet with Mr Hobbs then? A. No, there was no one staying there then.
- Q. No one living there then? A. No. 10
- Q. You identify it as being the house you saw there in 1894? A. The same house.
- Q. You got on the ground and got to the house. What did you next do? A. It was on the Sunday night I think when we got out there; and the next morning I commenced to make a survey of the land.
- Q. Who were all there? A. Mr Hobbs, Mr. Murray, Mr. Holmes, and I think, Mr. Luckner, I am not sure. Anyway there was another man there but I forget whether it was Mr. Luckner—it was someone living out there. 20
- Q. You say Sunday night you got out there, and Monday morning you started in to make a survey? A. Yes
- Q. Who assisted you in making the survey? A. These parties that I mentioned.
- Q. All of them? A. I think so.
- Q. Mr. Murray said he was there and acted as a chainman? A. Mr. Hobbs, Mr. Murray and myself stayed in the cabin all Sunday night.
- Q. And in the morning?— A. In the morning, I think, Mr. Hobbs went for 30 Mr. Holmes; I am not sure. Anyway Mr. Holmes came there.
- Q. Anyway, you all started out to make the survey? A. Yes.
- Q. Mr. Murray said he was one of the chainmen? A. Yes.
- Q. Where did you go for your starting point? A. My field notes will show.
- Q. You sent them in to the Defendants? A. I sent them in to the Defendants At the request of Mr. McPhillips Mr. Pooley produced the field notes.
- Q. (Handing field notes to witness) Are these the ones? A. That is the copy. 40 There is another one; there is the original.
- Q. Which copy is this; the one that you sent to the Railway Company? A. Yes.
- Q. Well, that is the one we want to get at. A. I commenced at the Victoria Company's posts.
- Q. These are your field notes? A. Yes
- Field notes put in marked Exhibit "Y."

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Q. These are your field notes, and inside is a tracing? A. Is a tracing, yes.

Q. You identify now the field notes, and your tracing of the survey made at that time. A. Yes, made at that time

Q. These are yours? A. These are mine.

Q. Exhibit "Y;" and they went out of your custody to whom? A. I sent them down to Mr. Solly

Q. You sent them yourself down to Mr. Solly? A. Yes.

Q. On whose instructions? A. The instructions from Mr. Hobbs.

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Q. Now, you say you commenced at a starting point at the Victoria Lumber Co.'s post? A. Yes.

Q. That is—I think I am right, that is you have to tie on to some survey. A. Some recognized survey.

Q. And also you knew very well that the rule of the railway company was that there should be no broken— A. No fractions.

Q. No fractions. And you made your survey? A. And I made my survey in accordance with that.

Q. Consistent with those known rules? A. Yes.

Q. Now, looking at this tracing; the railway company in their deed have called it Lot 6, Douglas District; and we have also set it up as being Lot 6, Douglas District, and portions of 10 and 11, Cranberry District. Well, it does include as a matter of fact portions of 10 and 11, Cranberry District, does it not? Look at that tracing, Exhibit "I," that Mr. Solly handed the Plaintiff (I handed to witness). Look at the date—perhaps you need all these to compare (papers handed witness)? A. Yes, it is the same property.

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Q. That is you identify the tracings "Y" and "I" and the tracing on deed—all covered the same property? A. All covered the same property.

Q. "Y" and "I" and the tracing on "T" cover the same property? A. Yes; cover the same ground.

Q. This Lot 6 really covers a part of Cranberry District, that is Sections 10 and 11 does it not? To get at it, Mr. Priest, more accurately— A. Yes; it covers the same land.

Q. The district line between Cranberry and Douglas Districts intersects Lot 6? A. Yes. Of course, the district line is not surveyed.

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Q. But you as a surveyor assume that the district line will come through Lot 6? A. Yes.

Q. And consequently Lot 6 includes portions of Lots 10 and 11? A. Of Sections 10 and 11.

Q. Cranberry District? A. Cranberry District; Yes, 10 and 11.

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Q. Now on this tracing, Exhibit "I," you notice there is marked there a cabin down there about the centre (handed to witness)? A. Yes.

Q. And it is written on it also "F. V. Hobbs' Cabin"? A. Yes.

Q. Now turn to Exhibit "T," that is the deed, and do you find the cabin marked on it, too? A. Yes.

Q. The same cabin? Then looking at "Exhibit I" and "Exhibit T" you identify. A. I would take them as being about the same location.

Q. That is you would say that it is the same cabin? A. Yes, it is the same cabin. 10

Q. Well now, you say you saw the cabin in 1894? A. Yes.

Q. Now, Mr. Priest, you have now surveyed the property, of course? A. Yes.

Q. And you have a good knowledge of its boundaries and everything. This cabin you saw in 1894 is the same cabin, that is about the centre of this property? A. Yes, the same cabin.

Q. I believe you did not see the original application that Mr. Hobbs made; of course he left that with the E. & N. Railway Company, but I will refer you to that. In that application it reads, as follows: (Reading document 28th Nov., 1889. "Exhibit G.") Well now there you will notice that a post is mentioned, and a swamp. There is a swamp on this land that you surveyed? A. Yes. 20

Q. A ridge on it too? A. Yes.

Q. And did you notice any post there at all? A. I saw a post some time in 1894.

Q. And where would you place that post. Mr. Murray spoke of a post. A. Yes.

Q. You were here in Court when Mr. Murray gave his evidence. A. Yes. 30

Q. Is it the same post? A. I presume it must be the same post

Q. He gave some bearings? A. Yes.

Q. About 100 yards from the north boundary? A. Yes; it is about the same place.

Q. You identify having seen a post about the same point in 1894? A. Yes; I saw it in 1894, and I saw it later again; but I cannot tell the date. I saw the post twice before I surveyed the land. 40

Q. You saw the post twice before you surveyed the land? A. Yes.

CROSS EXAMINED MR. POOLEY.

Q. When did you see that post last; when you were surveying there? A. When I was surveying

Q. Had it any mark on it? A. I don't think so

Q. Did you examine it, very closely? A. I think once I examined the post?

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Q. You think once you examined the post? A. Not the first time I saw the post—I don't think I examined it then—but the second time I saw it, I think I looked at the post, and I do not remember seeing any mark upon it.

Q. Did it appear to have been put there any time when you saw it in 1894? A. It had been there a long time.

Q. This land was claimed by Mr. before Hobbs took it up? A. I don't remember.

Q. But that post may have been there before Mr. Hobbs went there; it might have been any one else's post? A. It might have been any one else's post. I don't know who placed it there.

Q. It had no marked place on it? A. It had no mark on it; I don't remember of any mark being upon the post.

Q. When you surveyed this land, Mr. Priest, you surveyed it, did you not, from that Exhibit, that last map from the office, and from Mr. Hobbs' description? A. He showed me the description—that is the description he got from the railway company, signed by Mr. Trutch. 20

Q. He showed you that? A. Yes.

Q. You did not survey according to that though? A. No; I surveyed it in accordance with the map that he gave me.

Q. The last one? A. Yes.

Q. If you had surveyed that land according to the directions in the receipt, which he showed you, from Mr. Trutch, would you have placed the land in the same place?

Mr. McPhillips: You had better read it to him.

Mr. Pooley: He said he had it in his hand. 30

Q. (Exhibit "C" handed to witness) Just read that, Mr. Priest. That is what was shown you, was it not? A. Yes. (Reading it).

Q. Have you looked it through now? A. Yes.

Q. It is the same one he showed you? A. Yes.

Q. Now, if you had surveyed that land according to that receipt, would you have placed the land in the same position in which you have defined it? A. I don't know. I don't think hardly it would be in the same place. 40

Q. It would not be in the same place? A. No.

Q. It would be further west. A. Of course, I don't know, I never chained through there. I don't know the distance from Mr. Stark's land. I have never chained through from Mr. Stark's place to Mr. Hobbs' place.

Q. Look at this plan will you (handed to witness). Now, there is Stark's Crown Grant to start with, you see. From that description and that plan, just lay out where that land would come; by that description and that receipt, as a surveyor, where would you think it would be.

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Mr. McPhillips objected on the ground that it is not shown what land is referred to as Stark's Crown Grant; and Stark's might have a Crown Grant further off.

The Witness. I think there is two.

Mr. Pooley: Q. Where did he get the other Grant? A. I don't know, I think it is a Grant from the Company.

Q. But that is not a Crown Grant. You can take this plan if you like; I don't care which plan you look at (another plan handed to witness). Well, now, taking it from that description where would you lay off that land on that plan? (referring to first plan). I will read the description to you from this document here (Exhibit "C"): Beginning at a point about two miles west of Louis Stark's Crown Grant in Cranberry District. A. Yes; but then that does not say definitely whether it commences at that corner or not (indicating).

Q. Then again, take the lower corner if you like? A. You have no point there then.

Q. Two miles? A. Of course, two miles would take it to where you have it marked in blue.

Q. With this plan in your hands as as a surveyor, where are you going to find the land? A. Of course, taking it strictly according to that description.

Q. That is what I am asking you; taking it strictly according to that description. There is a description placed before you, where would that land be? A. That is where you have it marked blue

Q. That would be where? A. It is marked blue on that plan.

Q. Now where is the land Mr. Priest on that plan which you have surveyed? A. It is marked as Lot 6; I presume that that is the same place. It is coloured yellow or brown on this.

Q. That marked blue is the piece of land according to the receipt; the piece of land marked Lot 6, is what you surveyed? A. That is what I surveyed; yes.

Q. Look at that plan of Mr. Gore's there, and see where that would fit on that plan, "Exhibit F?" A. (Looking). Of course, that will be right through there, where this is coloured brown.

Mr. Pooley: I will prove that map by Mr. Pinder afterwards

The Court: You can put it in subject to your undertaking to prove it.

Mr. Pooley: Very well, sir.

Map put in by Mr. Pooley. Marked Exhibit "Z."

Q. You say you saw that cabin there in 1894? A. It was there in the fall of 1894.

Q. Anyone occupying it at that time? A. No one occupying it at that time.

Q. Doors and windows in it? A. I did not go down close to it; I just saw it.

Q. Was it a square cabin? A. Just one log cabin; there is no partitions.

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Q. What is the character of this ground that you surveyed for Mr. Hobbs? A. Well, there are some swamps upon it—swamp land—and the remainder of the land is very rocky.

Q. How many swamps are there upon the land? A. I cannot tell you; I don't know.

Q. You did not see them in your survey? A. I did not see all in my survey.

Q. How many did you see? A. I saw, I think, three or four. I cornered in on one; of course, I don't consider it as being on the ground; it was just a little piece where the line cuts into it.

Q. You saw three? A. I think I saw three.

Q. What was the extent of those three swamps in acreage? A. I don't know.

Q. Cannot you tell? A. I did not go around them.

Q. Cannot you tell us with your practised eye, about what? A. I could if I went over them.

Q. Of course, you could if you chained them? A. I did not go around them. I just took a casual observation.

Q. Is there 100 acres of swamp? A. I do not think so.

Q. Do you think there is 20? A. I couldn't say, I know there is not 100.

Q. Would you judge there was 20? A. I should judge there would be 20, certainly.

Q. You did not survey them of course, but you would judge there would be 20. A. I would judge so.

Q. Would you call it a first class farm. A. I would not call it a first class farm by any means.

Q. Did you ever try to put down a stake in those swamps? A. I did not try that at all; I did not even go on them, only where my line ran.

Q. Is it not a surveyor's business to ascertain the character of the land when he goes on it? A. Not necessarily.

Q. Do you know whether Mr. Hobbs found any coal on this land or not? A. In a conversation with him he told me he had found coal there.

Q. On his land? A. I don't know whether he said on his land or somewhere in that vicinity.

Q. Did he tell you when he had found it? A. Some time when he was living there.

Q. Some time when he was living there? A. I believe so. Sometime when he was living on the ground.

The Court: Do you refer to the time that he told you or to the time that he told you that he had found the coal? A. He told me when I was surveying the land that he had found coal there.

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Mr. Pooley: Q. Did he show you where the coal was? A. No.

Q. Did he leave you to go and look for it? A. Leave me to go and look for it?

Q. Did he go and look for it while you were there? A. No.

Q. Did he tell you he was going to look for it? A. He told me he had been to see it.

Q. He told you he had been to see it? A. Yes.

Q. Whilst you were there? A. Not whilst I was there. A day or so before I went out to survey the property. 10

Q. He told you he had been to see it? A. Yes.

Q. Did he tell you it was on his land? A. He did not tell me where it was.

Q. He did not tell you where it was? A. Not then.

Q. But he told you it was somewhere in the vicinity? A. He told me it was somewhere in the vicinity.

Q. And you did not see it? A. I did not see it. I have not seen it yet.

Q. But he had found that coal there. He had found that coal when he was living there? A. I think he told me he had found it when he was living there. 20

Q. He had found it when he was living there? A. Yes.

Q. And he has not been living there since 1892. Did you know that the E. & N. Railway Company always reserved the coal and minerals on their lands? A. I have always presumed so.

Q. Have you always heard it said so? A. All the deeds I have seen, it has been reserved.

Q. Have you ever heard it spoken of as reserved? A. Yes. In fact one deed I have from the Company is reserved; one lot. 30

Q. It was matter of common report, wasn't it, at Nanaimo, that the minerals of the Company were always reserved? A. Yes.

RE-EXAMINED BY MR. MCPHILLIPS.

Q. Now, my learned friend, referred you to a plan here upon which there are three colors, at least the blocks colored blue, pink and yellow? A. Yellow and brown.

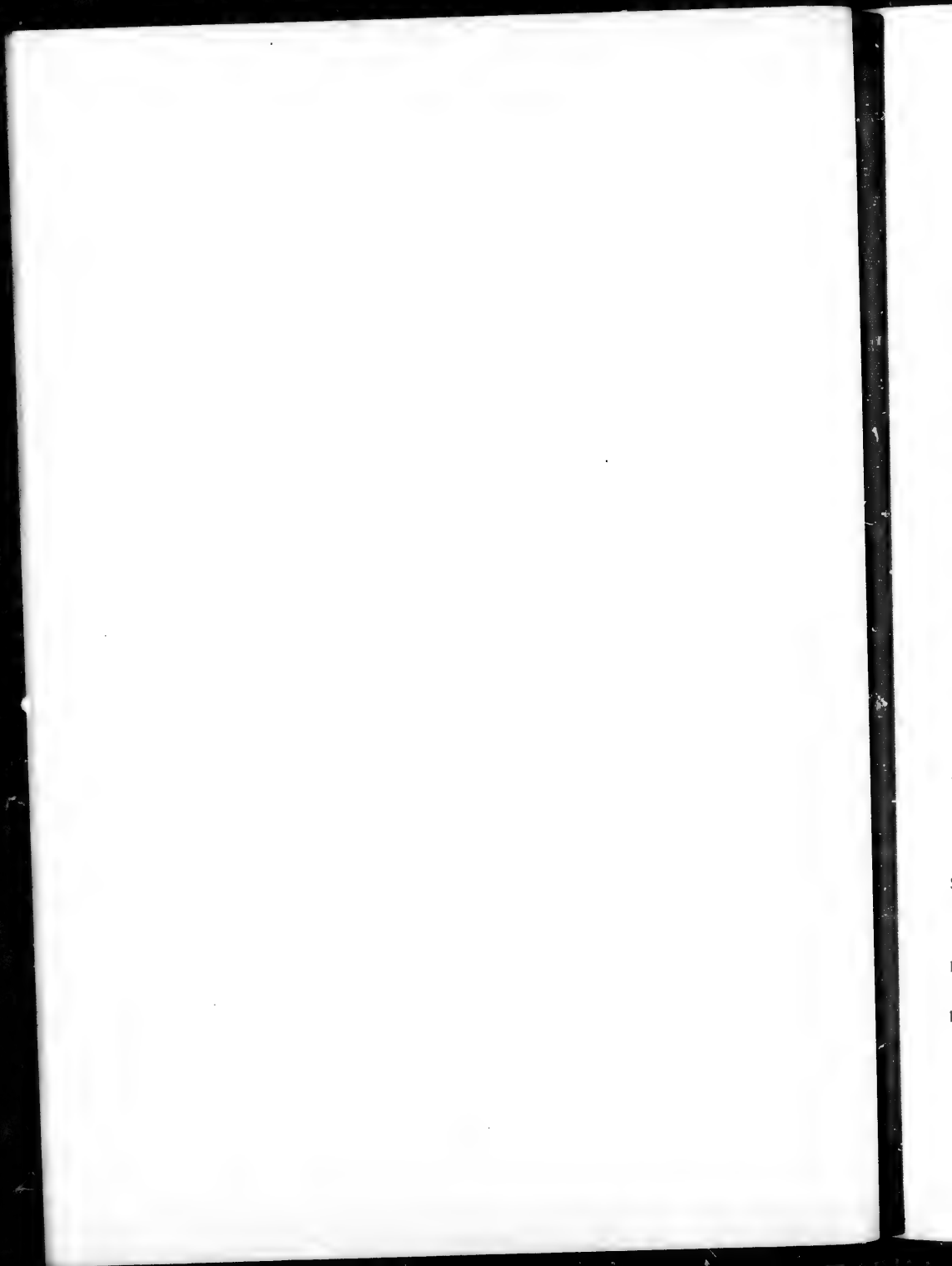
Q. You call them blue, yellow and brown? A. Yes. 40

Q. On this plan there is also a piece of property colored red? A. Yes.

Q. Called Louis Stark's? A. Yes.

Q. Now, in answer to my learned friend, you said that if you had described the land according to that receipt—if you had surveyed it according to that receipt, you would have brought it out here, where it is blue? A. Yes.

Q. Now, blue would fetch you on to whose property, looking on this plan? A part of the timber limit and part of Lot 2 and Lot 3.



- Q. It would have brought you on to Victoria Lumber Co.'s limits? A. Yes.
- Q. And Lot 2 and Lot 3? A. Yes.
- Q. That is according to what you said? A. Yes.
- Q. That was already disposed of, wasn't it? A. I don't know.
- Q. We will get at that, as a fact, at any rate, it is not unoccupied land? A. Of course, I didn't know at that time.
- Q. Now, when you say that, Mr. Priest, I want to understand you; I want to know what you are basing that statement on. Is it that it is to be two miles exactly? A. ¹⁰ Exactly.
- Q. From Louis Stark's Crown Grant? A. Yes.
- Q. And two miles due west? A. Yes.
- Q. Yes; I understand you, then, in answering my learned friend, you assumed that you were confined to— A. Confined strictly to the question—
- Q. Confined strictly to two miles west of Louis Stark's Crown Grant? A. Yes.
- Q. What do you understand by Crown Grant in saying that Crown Grant in Cranberry District? The Crown Grant itself is not there; what do you understand? A. I don't know. ²⁰
- Q. When you were answering my learned friend, you understood from Crown Grant, Louis Stark's land. It was land you understood? A. Yes.
- Q. And looking at this plan you also understood another thing, Mr. Priest, didn't you; you understood it would have to be produced—the north and south line would have to be produced parallel with Louis Stark's Crown Grant, north and south. A. That would be the west line. ³⁰
- Q. It would be the north and south produced due west? A. Yes, at right angles.
- Q. Now, how many things have you assumed now? You have assumed it was to be exactly two miles, haven't you. A. Yes.
- Q. You have assumed that. You have assumed that it was due west? A. Due west.
- Q. Yes. And you have assumed that you had to keep at right angles with Louis Stark's Crown Grant? A. Yes. ⁴⁰
- Q. You were in pretty narrow lines in answering that, weren't you? A. Yes.
- Q. Pretty narrow lines. Now looking at Exhibit "C" it says, "Commencing at a point about two miles?" A. Yes.
- Q. There is a little latitude in that, isn't there, "about?" A. Yes; of course, I presumed it would be exactly two miles.
- Q. You assumed that; but it is "about" here? A. "About" two miles.

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Q. And then it says: "About two miles west of Louis Stark's Crown Grant." It does not say at right angles to Louis Stark's Crown Grant does it? A. It is presumed in making a line west—in making a survey, it is supposed to be due west.

Q. You presume that? A. That is strictly speaking. It would be defined as being due west, or due north and south.

Q. But when you say due west of a Crown Grant, it is consistent with being due west from the north line, or due west from the south line? A. It is due west from any line, unless there is a given point.

The Court: Q. It may be due west from both north and south lines parallel? A. Yes. ¹⁰

Mr. McPhillips: Q. Now suppose it were due west from the north boundary line of Louis Stark's Crown Grant, the Lot 6 as described is in its correct position is it not? Produce the north line going westerly from Louis Stark's Crown Grant—produce the north boundary? A. It was produced from this line (indicating.)

Q. If you produced it—you have assumed that it had to be within those parallel lines? A. Yes. ²⁰

Q. But when "west" was used; assuming that it might be west of the north boundary line of Louis Stark's Crown Grant. A. Yes.

Q. If you produced that, then you have not lot 6? A. No; it would not be in the same place.

Q. But it would not be exactly two miles away, but it would be in that direction? A. Yes, it would be in that direction.

Q. I mean to say, the Northern boundary line of Louis Stark's Crown Grant produced forms as it is now a portion of the South boundary of Lot 6? A. Yes, it forms a portion of the boundary. ³⁰

Q. Is the actual boundary line? A. Yes.

Q. It is the actual boundary line? A. Yes, but then the description is not the same.

Q. In what way? A. You see your description commences from a definite point, at 1 —

Q. A point about 2 miles west of Louis Stark's Crown Grant. A. Then from that 40 you go west.

Q. That is west 40 chains? A. And then south.

Q. Yes, south to Berkeley Creek. Oh, well, there is certainly some discrepancy? A. It is not strictly—

Q. But I want to call your attention, Mr. Priest, to the fact that in answering those questions to my learned friend you assumed something? A. I assumed it was two miles from the claim—

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Q But considering your knowledge as a surveyor, and the year, it was 1889, what would you say about this description? A. At that time I would assume it a proper description. That is, considering that no surveys had been made.

Q Considering the fact that no surveys had been made? A. Yes.

Q About the best Mr. Trutch and Mr. Hobbs could do under the circumstances? A. I think so.

Q Now I show you the Official Map, as it is called. It is called here "Cranberry District. Official Map, 1859." That will be an exhibit I suppose? A. All those surveys were not made on the map at that time (1859).

Q No; it has been filled in according to surveys made and grants issued? A. Yes.

Q You do find now a piece of property granted to Mr. Louis Stark? A. Yes.

Q What is this piece lying to the north? A. There is one fractional portion of a section.

The Court: Q. Two pieces of land are accredited to Louis Stark; and one is what? A. One is a Crown Grant, from the Government, 160 acres.

Q A quarter section? A. It is not in a quarter section form—it is broken up 20

Q And the other is what? A. The other is a portion of a section, a fraction.

Mr. McPhillips: Q. It lies to the north and west? A. It lies to the north and west of the Crown Grant.

Q And it has that lake on its eastern border? A. Yes.

Q What lake is it? A. Harewood Lake.

Q Now looking at this land of the Plaintiff, Hobbs—you find it sketched in pencil opposite, do you not? A. Yes. 30

Q It happens to stand opposite to this upper portion of Stark's, does it not—a portion of it? A. Yes, it is not that distance.

Q It is not that distance away, that may not be correct? A. I don't know whether it is correct or not. (Measuring on map) It is only a little over three-quarters of a mile.

Q But this is not plotted here, you know. However; it would however be about opposite to— A. It would be west of that; Hobbs land would be west of that.

Q It would be due west of that upper portion? A. Yes. 40

Q It would be due west of this fraction, this upper land of Stark's.

The Court: Q. Which is that—the 160 acres or what? A. The fraction.

The Map of Cranberry District here referred to, was put in and marked Exhibit No. 1.

Mr. McPhillips: Q. Now you see, on this plan, which my learned friend referred to, marked Exhibit "Z," a piece of property accredited to Donahue, don't you? A. Yes.

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Q. Now, in this application that I read to you, that the Defendant Company had, it is "on or about two miles west of Lower Harewood Lake, and about a mile or a mile and a half or two miles from Donahue's claim." Now you just refer to that? How far is Donahue's claim from the land as now defined? A. About three-quarters of a mile.

Q. Just up to the land, as it is there? A. (Measuring.) It is 57 chains, that is, very nearly three-quarters of a mile.

Q. Mr. Hobbs' land as now described, Lot 6, lies three-quarters of a mile to the east of Donahue's? A. To the east of Donahue's.

Q. And in the application it says, a mile or a mile and a half or two miles. How far is the blue piece from Donahue's? A. The blue piece is five chains from Donahue's.

Q. In your answer to my learned friend, you said that would be taking it within those claimed lands that he mentioned, the blue piece would only be five chains west of Donahue's? A. East from Donahue's.

Q. East from Donahue's. Yes, Donahue's claim too, lies further north than Stark's Crown Grant, that you have referred to, does it not? A. Yes, a little.

Q. About half the section I should say higher? A. It is just one section.

Q. One section higher? A. That is a quarter of a mile.

Q. It lies a quarter of a mile to the north? A. A quarter of the mile to the north.

Q. To the north of what? A. To the north of a line drawn from Stark's.

Q. To the north of what? A. To the north of the south boundary line of Stark's Crown Grant.

The Court: Q. That is the 160 acres? A. Yes.

Mr. Pooley: I ask your Lordship to ask the witness one question here. On which land is Mr. Stark's house situated?

The Court: Q. Which of these, the 160 acres or the fraction, is Mr. Stark's house situated on? A. It is on the 160 acres I think.

The Court: Q. That is a dwelling house? A. That is a dwelling house.

The Court: Q. Has he got any building at all on the fraction? A. Not on the fraction—no.

Q. Well, now, taking Mr. Trutch's receipt, could you without difficulty have located the land he describes there? A. Well, it would be rather difficult, because—

Q. Well, could you do it? A. Well, of course, I don't know the presumption that these two parties had when they drew up the document.

Q. But taking the document itself, never mind their understanding, could you locate the land that is described? A. I would have to assume that it was from the north boundary of the Crown Grant, and then run two miles west.

Q. Yes, assuming it was from the north boundary? A. From the north-west corner that would be.

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Q. Yes, from the north west corner; and then running due west? A. Due west ¹ two miles.

Q. You would locate it then in the same place, where you located Lot 6? A. No, it would not be in the same place. The description is a little indefinite in itself, as really there is no starting point to commence from Stark's.

Q. No, it does not tell you which corner to commence from? A. No.

Mr. McPhillips: Q. Just one thing about that coal, I forgot about that. You said something about the plaintiff saying something about coal. He did not say that he ¹⁰ found any coal on his land, did he? A. No, I don't think he said it was on his land.

Q. He knew of coal? A. He knew of coal being in that vicinity.

Q. In that vicinity? A. Yes. I know from his description afterwards to me of where he had found the coal.

Q. What? A. From the description that he gave me afterwards of where he had found the coal I knew it was not on his land.

Q. You knew it was not on his land? A. Yes.

Q. From the description he gave you of it afterwards you knew it was not on his ²⁰ land? A. Yes. That is the land that I surveyed.

The Court: Q. Now, taking Mr. Trutch's receipt and assuming the starting point is at the northwest corner of Stark's land, you would then, by the description given in the receipt, that is two miles from there; come to the south line of Mr. Hobbs' land, you know? A. Yes.

Q. Now produced due west parallel in all respects, and continuing for two miles, it would take you on to the Victoria Lumber Company's ground? A. Yes.

Q. That is not the E. & N. Railway Company's land at all? A. No, it takes ³⁰ you to this claim (indicating.)

Q. How is that? It cannot be two miles to this place and two miles to here, as well (indicating.) A. No, it is not two miles to there; that is the ground actually occupied.

Q. The ground actually occupied is not two miles? A. No, it is not two miles. The way that the trail goes, of course it would be two miles by the trail.

Mr. McPhillips: Q. It would be two miles by the trail? A. It would be two ⁴⁰ miles by the trail, about.

Q. And it would be two miles west by the trail? A. In a westerly direction.

Q. I mean to say, following the trail, it would be about two miles west? A. Yes, from Stark's cabins.

Q. Where Hobbs' land is described now? A. Yes. That is where the old trail went.

Q. And that is the only trail there was then? A. Yes.

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The Court: Q. Mr. Trutch's receipt does not refer to Donahue's land does it?
A. No.

Mr. McPhillips: It is the application, my Lord, that refers to Donahue's claim.

The Court: Q. What is marked as section 8 and section 9 are the pieces comprised within Mr Gore's tracing? A. Yes.

Mr. McPhillips: In Exhibit "F" my Lord.

Witness stands aside.

Court adjourned until to-morrow at 11 a.m.

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EXAMINATION EVIDENCE BEFORE TRIAL—PUT IN BY PLAINTIFF.

JOHN TRUTCH, being duly sworn, testified. Examined by Mr. McPhillips.

Q. Your name is Mr. Trutch? A. John Trutch.

Q. Do you know the Plaintiff in this action, Mr. Hobbs? A. Well, I do not know²⁰ him personally; I do not remember him.

Q. I think he is in this room here now. Do you recognize him? A. Well, no. I do not. I have a sort of idea that I have seen him, but I can't place him at all.

Q. Of course, it is a long time ago? A. Nine years ago nearly. I have a sort of idea I have seen him, but in connection with what, I could not say.

Q. Now, on November 28th, 1889, you were acting, I believe, as Land Commissioner for the E. & N. Railway Company? A. Yes.

Q. The Defendants in this action? A. Yes.

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Q. When had you been appointed to that office? A. Oh, I was appointed in June, 1887.

Q. June of the year 1887? A. Yes.

Q. Do you remember how you were appointed? A. I was appointed personally by Mr. Dunsmeir—Mr. Robert Dunsmeir.

Q. That is the late— A. The late Mr. Dunsmeir.

Q. The late Mr. Robert Dunsmeir. Well, this Company was then in existence, the⁴⁰ Defendant Company? A. This Company was then in existence.

Q. And what position did Mr. Robert Dunsmeir hold? A. He was the President of the Company.

Q. And he appointed you to the position of Land Commissioner of the E. & N. Railway Company? A. Yes.

Q. Now, do you know whether or not there was any resolution of the directors of the Defendant Company appointing you Land Commissioner? A. I do not.

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Q. You were not familiar with the records of the Company? A. I had nothing to do with that whatever, only personally with the President.

Q. Well, you entered upon the discharge of your duties as Land Commissioner?
A. Yes.

Q. And were exercising them on the 28th November, 1889? A. Yes.

Q. Who did you report to, or were you required to report to, exercising the office of Land Commissioner? A. Oh, I reported from time to time to Mr. Dunsmuir personally.

Q. That is during the late Robert Dunsmuir's lifetime you reported to him? A. To him, and afterwards to Mr. James Dunsmuir.

Q. And afterwards to Mr. James Dunsmuir, who is now Vice-President of the Company? A. Yes.

Q. Now you say you had no appointment under the seal of the Company as Land Commissioner? A. No.

Q. Well, who defined your duties as such? A. The late Mr. Robert Dunsmuir.

Q. Yes. Verbally? A. Verbally.

Q. And that was the condition of things on the 28th day of November, 1889, too?
A. In fact Mr. Robert Dunsmuir conducted and managed the affairs of the office, so to say, he kept everything under his personal management.

Q. Practically Mr. Robert Dunsmuir managed the concerns of the Company? A. He managed the concerns of the Company.

Q. On the 28th November, 1889, at any rate, you signed this writing? I just produce it to you (handed to witness) A. Yes, that is my writing.

Q. This is the document marked Exhibit "B" on the examination of the Plaintiff taken yesterday. You say this is your writing then? A. Yes.

Q. It is all in your writing other than the printed matter on it? A. Yes, all in my writing. It is all one writing.

Q. It is headed "Esquimalt & Nanaimo Railway Company, Land Department"?
A. Yes.

Q. That Land Commissioner is Land Commissioner of the Esquimalt & Nanaimo Railway Company? A. Yes.

Q. Yes. Do you remember the circumstance attending the writing, or signing of this writing of the 28th of November, 1889? A. Well, I have a faint recollection only of it. I have a recollection of the district, of the tracts out there, and also Stark's claim that was mentioned as the starting point; because there had been a great deal of litigation between Stark and a man called Scannell, that I had a great deal of trouble and correspondence about; in fact they had some trial in regard to the land there, and I was well posted up with regard to Stark and his location.

Q. Yes, where Stark's place was? A. Where Stark's place was.

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Q. Yes. But now, adverting to the time that this must have been signed by you, you do not remember then the plaintiff particularly? A. I do not remember the plaintiff particularly.

Q. No. A. I remember at about that time there were several locations taken up there west of Stark's claim, at or about the same time—that were taken up there, outlying west of it, outside of Cranberry District.

Q. Yes, but the description of the land. You remember where you took that from, or did you take it from the Plaintiff? A. I took it from the Plaintiff.

Q. Did he hand you anything to guide you in the matter? A. Yes, the description of the land was made out, from what he handed me. 10

Q. I think what he handed you—at least my learned friend put it in, and I think it was identified, at least it was referred to on the other examination, Exhibit "A" (handed to witness.) A. Yes, I have seen this, and it was from this that I wrote out the description of the place that he wanted.

Q. That is Exhibit "A" in the other examination. But, as a matter of fact, Mr. Trutch, you made your description a little more exact than that, did you not? A. Well, I don't know. 20

Q. Can you follow that one as I read this? A. Yes.

Q. I will just read Exhibit "B," and Mr. Trutch is looking at Exhibit "A" (reading description of land). A. Yes, that is here.

Q. Is it all there? A. All here. The only thing is that I put in the distances, which he wanted, 160 acres, and it says to contain on or about 160 acres.

Q. You amplified this description? A. I amplified his description by putting the length of the line. 30

Q. The forty chains? A. Yes.

Q. I see; that is the change you made? A. Yes.

Q. Now, you speak here, Mr. Trutch, of commencing at a point about two miles west of Louis Stark's Crown Grant? A. Yes.

Q. What is the meaning of that? A. That is the description he gave me.

Q. But where was the starting point? A. I took the starting point from the north-west corner of Louis Stark's claim.

Q. In your mind it occurred to you in that way? A. No, on the plan 40

Q. Did you have any plan before you at the time? A. I had a plan of Cranberry District with Louis Stark's claim.

Q. I see; you do not give any course there at all? A. It says west.

Q. About two miles west? A. West, yes.

Q. What do you mean by west? A. I mean west.

Q. Due west? A. Due west, of course.

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Q It says west of Louis Stark's Crown Grant, you see? A. That is the place, west of Louis Stark's Crown Grant

Q The Crown Grant would not be land? A. It is his Crown Grant in Cranberry District; his Crown Grant of his land in Cranberry District

Q Well, now, I notice another point in here, in this application; no district is stated—no, let me see, Cranberry District is stated. A. Yes.

Q And I see you inserted in Bright District in the— A. Well, those districts west and south of Cranberry had never been surveyed, and they were ill defined, and that is an error subsequently determined. Douglas District has been placed west of Cranberry; and in the description given, Bright is incorrect. 10

Q Yes. Well, as a matter of fact, there was doubt about their position at that time? A. They had not been located or defined, or published at all officially. There were no plans in the office of them laid out.

Q And as a matter of fact, Douglas District is where Bright District was supposed to be? A. Was supposed to be when I wrote that receipt.

Q When you wrote this writing of the 28th of November, 1889. Well, I suppose it was intended that the land would be more clearly defined later. Was that your practice in the office? A. Yes, that was the practice. And where land was taken up without any connection, in an indefinite manner like that, I was always anxious to get them surveyed as soon as possible in order that we might have an account and description of the country in the neighborhood, for our own information, and also to be able to locate or sell other land in connection with them. The sooner we could get them surveyed and defined and the notes of them, so that we could place them, the more desirable it was. 20

Q Yes. Well, now, as a matter of fact, Mr. Trutch, you did require all those applicants for land to tie on to some defined boundary in surveying their land, did you not? A. Well, I think—I cannot say that that was done in all instances. I do not know. I do not think that was done in all instances; I think there were some up at Comox that were away west of the settlements. 30

Q But wherever it could be done, it was required? A. Wherever it could be done, it was required.

Q Did the Plaintiff tell you when he came in— A. Excuse me one moment in connection with that. The following spring all the other pieces of land that had been taken up in the neighborhood, amounting to five lots, were surveyed, and they were connected with the district north by a line that was run down to them of three-quarters of a mile from Harewood claim—the Harewood coal mine; I have forgotten the name of the district—from the boundary post of the survey, that was made of the old Harewood Coal Mine Company's there was a post that the surveyor found, and number, and he ran south from that down to these claims belonging to Ross and Holm and Donahue—Mountain District—that was the connection he made in that case. 40

Q But at this time there was no definite survey to it? A. No better way of defining the position than was given there.

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Q. Than was given here. A. That was in his own words, so to say; that was his own language that he had given me.

Q. Now, do you remember that the Plaintiff told you at that time, November 28th, 1889, that he had erected a cabin, or was about to erect a cabin on the property? A. No. I do not remember.

Q. Or was intending to erect a cabin? A. I do not remember.

Q. Or whether he had been on the ground? A. I do not remember that.

Q. Or put a post in? A. I presume he told me he had been there, because he 10 described the place as commencing on the top of a ridge, and running—and therefore I suppose that he must have been there on the ground. But as far as knowing whether he had been there, or supposing—that is the only thing I should have to guide me in forming an opinion with regard to that.

Q. And at the time it was as close a description as you could very well make? A. The only description.

Q. The only description. And you took from him \$120, and the balance was to be paid in accordance with this writing of the 28th of November, 1889? A. Yes. 20

Q. Did you give him any other evidence of the purchase or sale, than this writing of the 28th of November, 1889? A. No.

Q. No other writing evidencing the sale? A. I don't remember that I did.

Q. Not that you know of. Did you take any from him? A. I do not remember that I did.

Q. He did not sign anything? A. I do not think so; only that application.

Q. The application is signed. I mean to say there was no other writing than this 30 application, at it has been called? A. Not that I am aware of, or remember.

Q. No. Was it the custom of the Defendant Company to take any, say, particular agreements? A. No.

Q. At the time of purchase? A. No, it was not.

Q. Or give any particular agreements of purchase? A. No, it was not.

Q. It was not. They had no printed forms, or anything of that kind? A. They had no printed forms. 40

Q. No forms settled by their solicitor? A. No.

Q. And it was not the custom to refer purchasers to the solicitor of the company? A. No.

Q. But you dealt with them yourself? A. I dealt with them myself generally, sometimes Mr. Dunsmuir dealt with them, in some instances, while he was alive.

Q. But the sales of lands were made by you, as a rule, I suppose? A. As a rule they were made by me.

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Q. I want to get at what knowledge the Defendant Company had of this sale? You see this the plaintiff took away (Exhibit "B")? A. Yes.

Q. Did you keep anything signed by him, or was there any writing in the books of the company by you to show that the sale was made to the Plaintiff? A. I do not remember anything.

Q. You do not remember any. Well, did you make any verbal report of this sale?
A. Oh, there is an account of it in the cash book

Q. In the cash book? A. Yes.

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Q. Have you the cash book here? A. I have not.

Q. You say, Mr. Trutch, there was an entry made in the cash book? A. Yes.

Q. Do you remember whether it is in your writing? A. It is in my writing.

Q. And that showed the sale to the Plaintiff of this land, did it? A. Yes.

Q. Do you think there was entry made in any other books by you. A. I do not think so.

Q. What record did you keep of this sale, Mr. Trutch? This you gave to the
Plaintiff, this exhibit of the 28th of November, 1889? A. Yes: 20

Q. What did you keep amongst the records of the Company? A. I kept a copy of this.

Q. That is, you had a copy of this? A. Yes.

Q. Made by yourself? A. Made by myself.

Q. What was your habit and custom in the office with respect to each sale of land? Did you have a packet covering each sale of land made, covering the documents or evidences of the sale having been made? A. No. I had a file of applications in each district. 30

Q. Yes? A. Pigeon-holed.

Q. Pigeon-holed? A. I kept them in order of dates, the applications.

Q. And you dealt with this one in the same way as you did with the others? A. I dealt with them in the same way as the others.

Q. And in that pigeon-hole, for instance, in this case there was a copy of this agreement, writing of the 28th of November, 1889? A. There was a copy of that, yes.

Q. Will anything else be found there? A. There was that application and the 40 copy of that. That application would have been with it.

Q. And a copy of this writing of the 28th of November? A. And a copy of that writing with it.

Q. Would that be all? A. That would be all to the best of my recollection.

Q. And you do not recollect in making any entry in any other book except the cash book? A. I do not recollect making any entry in any other book but the cash book of that.

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Q. According to your custom at the time you would not make any other entries, is that it? A. I would not make any others. When the lot was surveyed then I would enter it here in full, in full length, with an account of the number of the grant, and the date of it, and the payments in full on account of it, in this district register. At the same time it would be entered in the sales book.

Q. But, as a matter of fact, you did not make any other entry with respect to it? A. I did not make any other entries.

Q. Than as appears on page 59? A. When it remained in an informal state like ¹⁰ this case was.

Q. Now, we will go to another matter. The sale made to the Plaintiff was upon the terms set forth in this writing of 28th November, 1889? I mean to say there were no terms of occupation or anything of that kind. He was to pay \$3 an acre. A. There was no terms of occupation.

Q. That is, he was not bound to go on and build a house and occupy the property? A. No.

Q. He did, though, as a matter of fact, go upon the property and build a house, did ²⁰ he not? A. That—doing away with the obligation of residing on the land was made with a view of the increased price.

Q. From \$1 to \$3? A. From \$1 to \$3—well, \$2 to \$3, I think it was.

Q. At any rate that was the fact? A. In order that the claimant might not be bound to reside on the land, that he should be free to go away and work and make money elsewhere. That was the idea in relieving him of obligation of continued residence on it.

Q. There was to be no continuous occupation? A. No continuous occupation.

Q. But, as a matter of fact, this claimant did go upon this property, did he not, and ³⁰ build a house? A. I do not know anything about that.

Q. Did you become aware of that? A. I have never seen the plaintiff since that transaction, to the best of my recollection.

Q. And you don't know whether he did that or not? A. I don't know whether he did or not.

Q. He was at perfect liberty of course to do it in this writing of November 28th? He could go into possession of the property, could he not? A. I assume so.

Q. Well, was that part of the agreement. He was to be at perfect liberty, was he ⁴⁰ not, as a matter of fact, as far as the Company was concerned? A. Well, I don't know; I am not a lawyer, you are asking a legal opinion on that. I only know of what—

Q. Then you say that the agreement has to speak for itself then? A. I suppose so.

Q. Well now, did the Defendant Company, the E. & N. Railway Company, act wholly through Mr. Dunsmuir at this time, say November 28th, 1889, or were there any directors of the Company? A. I really do not know; I believe there were; I think they had—I think I heard of their being meetings held here, half yearly, or yearly.

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Q. Throughout, or about that time? A. At or about that time, yes.

Q. Do you know Mr. Trutch whether these land sales were brought under notice of the directors of the Company in any way? A. I do not.

Q. You do not know whether it was done or not? A. No.

Q. Well, I suppose the money received would be brought under their notice anyway—was it not? A. Well, I would think so.

Q. You would think so? A. Yes.

Q. At any rate you did not attend Board Meetings? A. It did not come within¹⁰ my—

Q. You never attended any Board Meeting? A. I never attended any Board Meeting.

Q. Or advised any of the Directors what had been done? A. No.

Q. Save advising Mr. Dunsmuir? A. Except Mr. Dunsmuir.

Q. And as you said before, Mr. Dunsmuir really acted for the Company? A. Mr. Dunsmuir really acted for the Company.²⁰

Q. When did you go out of the employ of the Defendant Company? A. The end of September, 1891, wasn't it? A. Yes, I went home in 1892; the end of September, 1891.

Q. And up to that time you continued to exercise your office of Land Commissioner? A. Yes.

Q. And throughout that time you do not remember having any negotiations with the Plaintiff? A. I do not.

Q. I do not think there were any anyhow. Well now, outside of that piece of³⁰ property you referred to, Mr. Wardroper, during your time of office, sales of land were made by you? A. I think all the land sales were to the best of my recollection. I may have omitted—forgotten the transaction.

Q. At any rate if there were any they would have been brought to your notice? A. They would have been brought to my notice because they would have to pass through my hands, I would have to receive the survey notes of them, and make out the deed.

Q. And at present you only recollect that one case. A. I only recollect that one⁴⁰ case.

Q. The Wardroper case. Now, did the directors intervene in any way in connection with the sales of land? Did they take any active part in selling the land? A. Only in directing the—in varying the amounts of land that might be sold and the price.

Q. Yes, that of course you would get from the directors? A. From the directors. In case there was a large amount applied for, I should refer it to them.

Q. But outside of those points you had authority to sell the land of the Company, of course. A. I understood so.

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Q. That is, you did not have to go to the directors to get their authority? A. No. Not as long as I conformed to the general instructions that I had.

Q. And who gave the evidences of sales, such as this for instance, this writing of the 28th of November, 1889? Was it always done by you? A. Well, I am not certain whether it was done by me. I don't remember now, there might have been a few cases where I was absent, that someone else might have—Mr. Hammond who was in the office there for several years, and died shortly before I left, he might have received—made a payment and signed it for me.

Q. But unless the directors varied the particular lands to be sold, and the price, you¹⁰ were the officer who executed the sales. A. Yes.

Q. That is to say, none of the directors used to execute any of the agreements for sale of land, and affix the seal, for instance, of the Company to it? You do not know of any? A. I do not know of any case.

Q. Or of the directors signing the agreement of sale themselves? A. They sold a lot of land to the milling and lumber company with which I had nothing to do.

Mr. Pooley: Q. If you had not sold it, you are making a mistake? A. What I mean to say was—there was some—I had nothing to do—all I want to do is to disclaim²⁰ any connection with that transaction. It never came through my hands.

Mr. McPhillips: Q. It was not the practice of the directors to make an agreement for sale, and affix the seal of the Company to it? A. No.

Q. And your notion is that all land sales came under your jurisdiction, or would be brought to your notice? A. Had to be brought to my notice, because I issued all the deeds for them; made them out in every instance.

Q. That is at the end in fact. You would know then whether any sales had been made in the way I suggested? A. I do not know of any instance; never heard of any.³⁰

Q. No. The sales were made through you. You said before you did not know whether the Plaintiff went into possession or not? A. I do not know.

Q. But as far as the Railway Company was concerned, he was at liberty to take possession of the land after he paid the \$120? A. Of the lands described there.

Q. Yes. Now who was to survey this land according to your idea of the matter, Mr. Trutch? I mean the particular survey of this land was to be made by the Plaintiff? A. Was to be made by the Plaintiff.

Q. That was understood? A. Yes, according to that description—in accordance⁴⁰ with that description.

Q. The land you say was to be surveyed later than the 28th of November, 1889, by the Plaintiff? A. By the Plaintiff.

Q. And it was to be submitted to the Company for their approval? A. The surveyor would get the description of it from me; I should instruct him.

Q. But as a matter of fact you did not do so in this case? A. As a matter of fact, I did not.

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Q. Now, Mr. Trutch, I will refer you to the application again. You see in this application it says "Commencing at the top of a ridge and running west to Berkeley's Creek, thence south down Berkeley's Creek to a corner post at a swamp; then east, then north to the top of the ridge at the place of commencing." Now, you know the post had been deposited in the land that the Plaintiff had been purchasing? A. I did not know that.

Q. It was in this writing here? A. I know that he stated it.

Q. That statement was made to you? A. That statement is there in writing. I made out the description from that because I saw that. 10

Q. Your intention was to give him the land that he had in this application described, wasn't it? A. Yes, if it was vacant.

Q. If it was vacant. You did not intend to give him some other land? A. I did not intend to give him any other land, I intended to give him the land he described and applied for.

Q. Yes. Well now you seem to lay some stress on "2 miles west of Louis Stark's Crown Grant?" A. It is there in the paper. I do not mention it. 20

Q. Who put it there? A. He did in his application. At the heading you will see.

Q. It says, "about 2 miles west of Stark's place;" it does not say other than that? A. Well.

Q. About 2 miles west of Stark's place. Do you want to bind the Plaintiff down to the exact astronomical bearing of west? A. I suppose when he says west, he means west, and when he says 2 miles he means 2 miles.

Q. But he said west of Stark's place, west of the place, where would it be west of, the southern boundary, west of the northern boundary, or west of the centre? A. Well, it is in effect—I have taken the most northern—I took the northwest corner of Stark's claim. 30

Q. What made you do that? I see nothing in these writings to show that. Nothing in the application of the 28th of November? A. Well, I suppose in agreement with him at the time, that is the only thing that I could suppose why I took that instead of the southwest corner.

Q. Well, your notion of the matter is— A. Instead of the southwest corner I took the northwest corner; I don't know why I did now; probably he said that would be the correct post, the one from which he— 40

Q. That is only your recollection? A. That is only my recollection.

Q. These writings do not say from what point you are to go from Stark's place; they merely say west of Louis Stark's Crown Grant? A. Very well, you take the most western part of it in starting from it.

Q. But you need not necessarily go to the northern? A. If I said west of Louis Stark's claim, I would not go to the eastern boundary.

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Q. No, not to the northern, or southern, but you might measure from the southwestern boundary, or from the northwestern boundary? A. I might; in effect I took the most northerly boundary.

Q. But that is only a recollection of yours; that is not in these writings? A. What is a recollection?

Q. There is nothing in these writings to tie you on to the northwest boundary? A. No, not to the northwest boundary any more than southwest boundary.

Q. Now, is there anything so severe in these documents, Mr. Trutch, but what the variation of west, might be a little northwest? A. North might be northwest, or north; I have heard people make the most extraordinary variations, it might have been southwest or south, he might have intended.

Q. However, going back to the subject matter, the idea was to give him the land he applied for? A. I could only describe it as according to his description; which I think you will agree he fairly—which you must admit is fairly in agreement with his description.

Q. I see one point of difference? A. What is that?

Q. You did not say anything about a corner post, and that is one thing which is cut off? A. Which corner post?

Q. The corner post at a swamp it says; thence east, then north, to the top of a ridge? A. Yes.

Q. You left all about the post out? A. Well—

Q. You knew at the time—at least he stated to you, as you say in this writing, that he had put a post in? A. I say that he put a post.

Q. It says here? A. That is his writing.

Q. Yes, according to your own statement; you do not know whether he did or not? A. I do not know whether he did or not.

Q. He said, "Thence south to a corner post at a swamp." A. He was not allowed to run the boundaries in any direction he might and claim it any length; it was understood and I told all settlers, they all knew, and I told them, that the claims were to be half a mile square, 40 chains by 40 or else 20 by 80, so as to make the tracts uniform, and that they could be joined together regularly; therefore, having commenced at his starting point, I say there that it should be 40 chains south, 40 chains east, north and west, to the place of commencement.

Q. But it was not your intention to give him other land than what he had been on, I suppose? The man had been on the property and put a post in? A. It was my intention to give him the land he applied for; I did not know what he had been on, or that he had been on any.

Q. It was your intention to give him the land he applied for. But I thought you were laying stress on the fact that this Plaintiff is now contending for land that this agreement did not refer to? A. No, I have nothing to do with that. I have not said anything with regard to that, I don't think.

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Q. I just wanted to find out whether you— A. You were asking me about the position of this land and the description of it, that is what I was—for instance, he says there with regard to the description of the land commencing from a post, then going south, east, west and north; I have no doubt that I settled the form of that with him personally at the time, as to whether it was to be half a mile square, a quarter of a mile or 80 chains. For his description there does not say in what shape the land is, whether it was to be an oblong or a square.

Q. As a matter of fact at that time and for a long time subsequently the particular property that was developed or surveyed was more or less in doubt? A. It was in doubt.

Q. Now did the Company or its directors ever raise any objection about that sale made to Mr. Hobbs? A. No.

Q. They never did. Have they questioned it now? A. I don't know whether they have or not raised a question about it; not to me.

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LEONARD HOLLIS SOLLY, being duly sworn, testified. Examined by Mr. McPhillips.

Q. Your name? A. Leonard Hollis Solly.

Q. When did you enter the employ of the Defendant Company, the Esquimalt and Nanaimo Railway Company? A. July, 1887.

Q. And you have been continuously in the Company's employ until now? A. I have.

Q. And you are now, employed by them? A. And am now.

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Q. Your office in respect of the Defendant Company, is that of Land Commissioner now? A. It is.

Q. How long has that been? A. Since May, 1894.

Q. You succeeded Mr. T. S. Gore, did you not? A. I did.

Q. As Land Commissioner. Mr. T. S. Gore, is not now in the employ of the Defendant Company? A. He is not.

Q. Well now, in what department were you on the 28th November, 1889? A. I was an assistant draftsman, and book-keeper, in the Land Department.

Q. The Land Department of the Esquimalt and Nanaimo Railway Company? A. Esquimalt and Nanaimo Railway Company.

Q. And what would come under your notice acting in that capacity? A. All receipts given for land sold and money received under the pre-emption record system.

Q. Well, did any sale of land made to Frank Vicker Hobbs come under your notice? A. From time to time.

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Q. And did you make any entries relative to it? A. I did; I entered the sale in the Land Sales Book.

Q. You might open the book where you made some entries there. A. (Doing so.) That is the entry of the receipt which you hold there; Lot 6.

Q. Just please read what is written there? A. I gave it the next lot number, six, Lot 6, at the time. Number of lot, Lot 6.

Q. It is first headed Bright District, isn't it? A. Bright District, yes. Date of purchase, 28th of November, 1889. Name, Frank Vicker Hobbs. How acquired, purchase. Acreage, 160 acres. Price, \$3.00. Terms, of payment and date when paid, first payment.

Q. Date when due, isn't it? A. Date when due, yes; first payment. Date when paid, 28th of November, 1889. Certificate or payment number - no number. Amount paid, dollars and cents, \$120. Remarks, balance in three yearly payments of \$120. Interest at 6 per cent.

Q. That was your entry. A. That was my entry.

Q. That gives the date of course? A. Most probably I entered it at the time.

Q. The same day? A. Not necessarily the same day. I might have entered up two or three sales at the same time. I might have had them handed to me the same day.

Q. This book is called what? A. Land Sales E. & N. Railway Company.

Q. Well, is there any other entry in that book relative to this land? A. There is (indicating it). It was eventually discovered that this land was not in Bright District at all, but that it was in Douglas District, and I made an entry here, Transferred to Douglas District, folio 87; from page 95.

Q. What do you find at page 87? Just read it. The same heading. A. Name of lot, Lot 6, Douglas District. It is an exact transfer of the same entry as before. Date of purchase, 28th November, 1889. Name of purchaser, Frank Vicker Hobbs. How acquired, purchase. Acreage, 160 acres. Price, three dollars. First payment 28th November, 1889.

Q. If you will permit me, the balance is put in there too, isn't it? A. Certainly.

Q. I would like you to be particular about it; read the heading and give all the entries that appear there? A. Balance, date when paid 29th April, 1896. Certificate of payment number 864. Amount \$360. Six years' interest same date, and receipt of the same number, \$129.60. Title fee, same date and same number, \$10. Total, \$619.60. Conveyance of title number 302. Date of issue, 1st May, 1896.

Q. I see that is headed at page 87, Douglas and Dunsmuir Districts? A. It is; Dunsmuir is put in because there is no separate room in this book for Dunsmuir District; and therefore one entry here is in reference to a lot sold in Dunsmuir District.

Q. Now I see. Those are all the entries? A. Those are all the entries with reference to that in this book.

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Q. In the Land Sales Book. And they were made—did you give the date that it was transferred? A. I do not know when it was transferred. When ever it was discovered that the land was not in Bright District, but in Douglas District, my attention was called to it by Mr. Dunsmuir.

Q. Can you tell about what time it was made by the entry? A. I can tell you about when it was made, because here was land sold to Mary Wilsom on the 13th November, 1891, you see, and she was given Lot number five. So that the next number that was taken was six. It must have been after that date that the transfer was made.

Q. It was sometime after? A. It was sometime after November 1891

Q. Yes. A. That this transfer was made. Otherwise it would have been given an earlier number.

Q. Yes. Now dealing with this property again, you speak of a title number—certificate of title number? A. Yes.

Q. Was not this sale to Hobbs found to cover some other property as well as Lot six? A part of the property is in Douglas District, and part of it is in Cranberry; but that portion of Cranberry was unsurveyed. It was not surveyed into ranges and sections, that portion of Cranberry District. Therefore the greater portion of the property is now in Douglas District, the whole property was called Lot six, Douglas District.

Q. But a portion of it was found to be Lots ten and eleven, Range eight, Cranberry District? A. I never knew that.

Q. Does not that conveyance read that way. A. Let me see the conveyance, please? It is simply called Lot six, Douglas District, here.

Q. In your conveyance you merely described it as Lot six, Douglas District? A. Yes. If Cranberry District had ever been surveyed into ranges and sections and the section lines had been contracted from where they now remained, then it would have been called Sections ten and eleven. But that had never been done; and it is simply called Lot six.

Q. As far as the Defendant Company is concerned, they treated it all as being Lot six, Douglas District? A. Yes.

Q. Although you say that if there had been a complete survey— A. Then it would have been necessary to describe a portion of that property as Sections ten and eleven, Range one, I think it is, Cranberry District.

Q. That is the explanation? A. Yes.

Q. You have no book covering Cranberry District, have you? A. I have the register.

Q. I mean you have no entry, say under the heading of, under Lots 10 and 11, no entry with respect of Frank Vicker Hobbs? A. I think not. I will turn up Cranberry District (doing so). No, there is no entry of Hobbs.

Q. You do not find any entry in the Cranberry District of Hobbs? A. No.

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Q. Well now, do you know when the Plaintiff, Hobbs, came first under your notice? Of course you made that entry in the book here at the time of the sale? A. Yes.

Q. You were not present when the sale was made with Mr. Hobbs? A. No.

Q. That was Mr. Trutch. You did not take part in that in any way? A. I did not.

Q. When did the Plaintiff's property come under your notice for the first time, other than your entry in the Land Sales Book? A. His property?

Q. Yes. A. At the time the coal discoveries were made in Douglas District, Mr. 10 Dunsmuir sent for me and asked to see a plan of all land that had been sold or taken up in that neighbourhood.

Q. When would that be? Do you know what year? A. That would be in 1895.

Q. 1895? A. 1895.

Q. Just before we go into that, Mr. Solly, now that book that we were referred to that Land Sales Book, what was the usual place of custody of that book? A. In the vaults.

Q. In the vault of the E. & N. Railway Company? A. Yes. 20

Q. In their office? A. In their office.

Q. Which was then on Government Street? A. Yes, corner of Government and Broughton Streets.

Q. I asked Mr. Trutch when the directors had meetings and one thing and another—do you recollect whether the directors took any active part as to what sales had been made? A. Never.

Q. They did not? A. Never. 30

Q. But still, the books and papers were there to be seen? A. Certainly.

Q. Now, I show you Exhibit "G" in the other examination (handed to witness). This is not your writing of course; but I suppose you are familiar with your predecessors? A. That is my writing, everything except the signature.

Q. I see. That is all right then. I show you this Exhibit "G" to the examination of the Plaintiff? A. Yes.

Q. And you recognize the writing on it as yours? A. I do; I filled out that 40 notice.

Q. Other than the signature? A. Yes, it is signed T. S. Gore, Land Commissioner.

Q. Are you accustomed to the signature of Mr. Gore? A. Yes.

Q. You have seen him write? A. Yes.

Q. And that is his signature? A. And that is his signature, yes.

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Q. And there is one of February 15th, 1894? A. That is also in my writing except the signature.

Q. This is Exhibit "H" of the examination of the plaintiff? A. Yes.

Q. And you also recognize Mr. Gore's signature? A. I do.

Q. Yes. Now you say these notices were filled out by you? A. Yes.

Q. Do you know on whose instructions you prepared those notices? A. It is very likely that I did not prepare them on any special instructions; it was my custom every year, or possibly twice a year to make out statements of that sort and send to all the purchasers who were in arrears as regards their payments, and they would simply be handed to the Land Commissioner for his signature, and then posted.

Q. Yes. I see in these notices the land in question is called Lot six, Bright District? A. Yes, that was before the transfer was made, you see.

Q. 1893 or 1894? A. Well, it still stood in Bright District; that is evident that it stood in Bright District Book here.

Q. You took your information from the Bright District— A. From the Land Sales Book, Bright District. 20

Q. That would be page 95? A. Page 95, yes.

Q. The transfer entry could not have been made at that time? A. It might have been, it might have been in two places, you see. And very probably these notices were not made by reference to this book at all, the Land Sales Book, but would be taken from the previous schedule of notices that were made.

Q. You had schedules of notices A. I had schedules of notices, with the names to whom they were sent to, and the previous schedule to that would show that no money had been paid, and therefore the full balance was due. 30

Q. Now, I show you Exhibit "D" of the examination of the Plaintiff, letter of Mr. Gore to Mr. Hobbs (handed to witness), dated 6th of April, 1892. Do you recognize the writing there? A. I do.

Q. Whose writing is it? A. T. S. Gore's.

Q. T. S. Gore's, styled Land Commissioner. He was then the Land Commissioner of the Defendant Company? A. Yes.

Q. Now, he says in that (reading the letter). Now, as a matter of fact, were you familiar with the tracing that was sent to Mr. Hobbs with this letter? A. I was not.

Q. You were not. I show it to you? A. I saw it in your office last evening; I never saw it before to my knowledge.

Q. This is Exhibit "E" to the examination of the Plaintiff (handed to witness). You do not recognize this? A. No; I recognize this as having been taken from a plan in our office, but I never saw this before.

Q. You never saw this particular exhibit before? A. No.

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Q. Well now, did the Plaintiff's purchase come under your notice after these letters in any way that I have referred you to, this letter of Mr. Gore's was the 6th of April, 1892, and you sent out notices in June, 1893, and February, 1894? A. Yes.

Q. Now, did you come in contact with the plaintiff consequent upon these notices being sent out? A. No.

Q. You did not? A. No.

Q. Was the matter of the plaintiff's purchase brought up in connection with your duties in the office of the Defendant Company at all? A. It was. 10

Q. Was it brought up by any application of the Plaintiff? It was.

Q. And what was that? A. To complete the purchase.

Q. An application was made by the Plaintiff? A. Personally.

Q. Personally? A. Personally, to complete the purchase.

Q. Personally, to complete the purchase; was it made to you? A. It was made to me.

Q. And where was it made? A. In my office. 20

Q. In your office, which then was where? A. The present offices of the Company, on Store Street.

Q. And that was the first time you came to know the Plaintiff? A. It was.

Q. Did he make himself known to you? A. He did—or I asked him his name.

Q. He came down there and you asked him his name? A. Yes.

Q. What did he say then? A. He said he wished to complete the purchase of some land that he agreed to buy. He either said Bright District or Douglas District I don't remember which. 30

Q. Can you give the date when that was? A. In November, 1895.

Q. And what did you say in answer to that? A. I said to him—I referred to the books—I referred to this book (indicating).

Q. You referred to the Land Sales Book? A. I referred him to the Lands Sales Book, and I said, Mr. Hobbs I am not prepared to accept the balance of this purchase money without referring the matter to Mr. James Dunsmuir; and I said "If you will wait a minute I will see if I can see him."

Q. Yes? A. I went to see Mr. Dunsmuir, and I took the plan in showing the⁴⁰ position of Mr. Hobbs' land in Douglas District.

Q. And do you remember what plan you took in at that time? You have not got it here with you? A. I have not got it here, a plan of Douglas District.

Q. Did you indicate on the plan where his property was? A. I did. I was telling you previously that I had.

Q. Previously you had? A. Mr. Dunsmuir, when this coal was first discovered he sent for me to find out what land had been sold, or agreed to be sold in this Douglas

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District, in that neighborhood of this claim, and then the matter was talked over between myself and Mr. Dunsmuir with reference to this property.

Q. When would that be about? A. I think it must have been the same year.

Q. 1895. A. A month or so previously, or perhaps more.

Q. A month or so previously to November? A. Yes.

Q. That is Mr. James Dunsmuir you are speaking of? A. Yes.

Q. Was it told to him that one Hobbs had bought land in that neighborhood? A. Yes, and we considered he had abandoned it. 10

Q. You referred to these notices of June, 1893— A. I said that notices had been sent to him from time to time, requesting the payment of the balance and interest due and that no notice had ever been taken by Hobbs, and that as Hobbs lived in Victoria I considered in all probability he had abandoned all title and interest in the claim, otherwise he would have come down to the office and tried to make arrangements to hold it.

Q. How did you happen to know he was in Victoria, Mr. Solly? A. Because in one of the schedules of notices which I have in my office, against his name, in Mr. Gore's writing is "Vict." When notes are put to that effect it is to address the party there. 20 And I looked up Hobbs' address in the directory and found it somewhere on Douglas street, keeping stores there.

Q. That information was obtained previous to those notices having been sent out? A. Yes.

Q. And this is what you discussed with Mr. Dunsmuir at that time, that you thought he must have abandoned this property? A. Must have abandoned this property, yes.

Q. So that when he came in you said you would have to consult Mr. Dunsmuir 30 about it? A. When he came in I said I would have to consult Mr. Dunsmuir about it.

Q. And did you do it? A. I did, while Mr. Hobbs was waiting.

Q. At that time? A. At that time.

Q. And what took place? You went and discussed the matter with Mr. Dunsmuir; not in the presence of the Plaintiff? A. No, he remained in my office, I went into Mr. Dunsmuir's private office.

Q. That of course is hardly evidence what took place. Now, cannot you fix that 40 date in November more closely than just November, 1895? A. No.

Q. You cannot fix it more closely? A. I cannot; it might possibly not have been November; I could not swear it was November.

Q. But your recollection now is that it was November? A. I think so, yes.

Q. You did not come to any agreement? A. No, Mr. Dunsmuir was not in when he came down. I could not talk the matter over with Mr. Dunsmuir at that time. I did see Mr. Dunsmuir about it afterwards, and he instructed me to write to Mr. Hobbs and

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state that the Company was prepared to issue a conveyance to him on the completion of the purchase, I think within two months, and having the land surveyed.

Q And you wrote this letter, Exhibit I, in the Plaintiff's examination handed to witness? A Yes, I wrote that myself.

Q Dated March 2nd, 1896, and signed by you. Leonard H Solly, Land Commissioner? A Yes.

Q Addressed to Frank Vicker Hobbs, Victoria, B.C.? A Yes; 6th March. I went to see him in February, yes.

Q Then after seeing James Du smuir—I think he is Vice President? A He is Vice President of the road.

Q You wrote the letter of March 2nd? A After seeing Mr. Dunsmuir. He said, "We may as well let him have the land; if we want it eventually we can take it if we want to."

Q And under his instructions you wrote that letter? A Yes, he told me I could write to Mr. Hobbs and tell him he could complete the purchase.

Q Well, did Mr. Hobbs, the Plaintiff, complete the purchase within the terms of 20 the letter, Exhibit I, here? A He did.

Q And made the payment required? A Yes

Q That was \$499.60? A I think so, yes. I wrote to him just before the expiration of that two months calling his attention to the fact that the two months would expire—to avoid a further complication.

At request of Mr. McPhillips Mr. Pooley produced letter.

Q Handed to witness). You got this letter, did you not, dated 10th April, 1896? A I did.

Q Addressed to you? A Yes.

Q As Land Commissioner, signed by the Plaintiff? A Yes

Q Well, he said in that letter—(reading letter).

The letter was marked Exhibit No. 1.

Q Well, now you did get plans and survey from Mr. Priest did you? A I did

Q Have you got that? A At my office.

Q You have not got that here? A I have not got that here, no

Q Did Mr Priest make a plan as well? A He did.

Q There is a plan on that deed that we were referring to a little while ago Was that Mr Priest's plan? A No, I made that plan; from Mr. Priest's survey. That is a correct representation of Mr. Priest's survey, the plan attached to the conveyance

Q The plan attached to the survey is a copy of Mr. Priest's plan? A No, it is a copy of the plan made by myself from Mr. Priest's notes

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Q. You did not have Mr. Priest's plan? A. Mr. Priest's plan is in the book of his field notes.

Q. There was no separate—I mean there was no plan that you could detach? A. It is attached, it is copied on tracing linen in the book, which you could take in or out

Q. But you did not use Mr. Priest's plan of the claims? A. No, sir, it is in the book.

Q. But it is certainly in accordance with Mr. Priest's plan? A. Certainly.

Q. And Mr. Priest's plan is a plan of Lot 6, Douglas District, I suppose? A. 10 Yes.

Q. Well, now, I see you say in here—you wrote a letter of April 11, 1896, to the Plaintiff (handed to witness)? A. Yes.

Q. (Reading letter)? A. Yes.

Q. Was this survey accepted? A. It was.

Q. Who accepted it? A. I did.

Q. As Land Commissioner? A. As Land Commissioner I accepted it. 20

Q. Yes. Now, your notices always referred to Lot 6, Bright District, did they not? A. Those do.

Q. Yes, and as a matter of fact the property ultimately determined on is Lot 6, Bright District; this district? A. Douglas District.

Q. You have explained the reason why it was Bright District. A. Bright District was away down to the south, and not on the west at all.

Q. That was an error as a matter of fact? A. It was a clerical error in the description. 30

Q. And it should be Lot 6, Douglas District? A. Yes.

Q. Therefore the whole transaction is referable to Lot 6, Douglas District, is it not? A. Certainly. The land desired by Mr. Hobbs was always in Douglas District.

Q. There is no question about that? A. There is no question about that at all.

Q. As a matter of fact the Company never were laboring under any misapprehension of that? A. Not the slightest.

Q. Any faultiness that may appear is by perhaps the strict reading of this writing of November 28th, 1889. A. In adopting perhaps to a very great extent Mr. Hobbs' 40 application.

Q. Yes. And when you made this tracing, which has been called exhibit "F," you simply were aware of the land that Mr. Hobbs intended to purchase? A. From the way it was placed on the plans.

Q. From the way it was placed on the plans? A. In the Land Office

Q. Well, in your dealings with Mr. Hobbs did you make any new agreement with the Plaintiff about this land? A. None.

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Q. No? A. Except verbal.

Q. Well? A. He was shown the plan showing the position of this land.

Q. Yes. A. And he said that was the land that he expected to get, that he wanted to get.

Q. I mean to say when you say the agreement there was never a—you never were at any disagreement about the land? A. No.

Q. I mean to say there never was any contest? A. There was never any dispute as to which land he was to have? 10

Q. As to which land he was to have? A. No.

Q. The whole dispute if any arises on the tenor of the conveyance? A. Exactly.

Q. Well did you have any discussion with him about what the tenor of the conveyance should be? A. No.

Q. Of course, adverting now to the time he made this purchase; November 28th, 1889, I suppose you had to do things more or less generally then, the system of surveying was not so complete that you could get any very accurate description of land? A. There was no survey made then under which you could have tied that property on, so far 20 as I remember.

Q. So that on both sides there had to be some latitude of language as to describing lands. For instance there you see yourself it was to be at a point commencing two miles west of Louis Stark's Crown Grant? A. Yes.

Q. I mean there was no block survey or anything that you could tie on to? A. No.

Q. So that is all that ever transpired you may say between you and the plaintiff? Had you any other meetings or communications? A. On the application for his conveyance 30 I forwarded it to him—and he sent—returned it with a letter stating that it was not acceptable to him.

Q. You received a letter to that effect? A. I did.

Q. Well now did you receive this money, the final payment for the property? A. The check I did.

Q. Yes, have you any entry in your books about the receipt of this? A. Yes.

Q. We already referred to that? A. Yes, gave the number of the receipt and the amount. 40

Q. The Company received that amount? A. Yes.

Q. You refer to this letter April 27th, you advised him that the two months would soon expire (letter handed to witness). A. Yes.

Q. That is your letter to him? A. Yes.

Q. (Reading letter). And after that you got the money and the cheque? A. Yes

Q. You acknowledged receipt of the cheque? A. Yes

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The notice referred to was marked Exhibit No. 2.

Q. Then you wrote a letter dated April 29th, 1896, in which you acknowledged receipt of the money? A. Yes.

Letter marked Exhibit No. 3.

Q. Well, then, you issued afterwards receipt number 864, the Company's receipt? A. Yes.

Q. That is your receipt, is it? A. Yes.

Q. Bearing date April 29th, 1896? A. Yes.

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Q. That is for the balance of the purchase money? A. Interest and conveyance. Receipt marked Exhibit No. 4.

Q. You sent a form of receipt for him to give for the conveyance, A. Yes.

Q. But that was returned to you—it was not returned to you of course? A. No, the conveyance was returned to me, but the receipt was retained.

Q. And that is the receipt (handed to witness)? A. That is the receipt, yes.

Marked Exhibit No. 5.

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Q. That went forward with this letter of yours of May 8th, did it not? A. The conveyance did and the receipt.

Q. Yes? A. Yes.

Q. And you recognize that letter as being yours? A. Yes.

Q. Written to the Plaintiff? A. Yes.

Marked Exhibit No. 6.

Q. Well, now the Plaintiff wrote to you in reply and returned the deed, did he not? A. He did.

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Q. That is the letter of the 9th May, 1896 (handed to witness)? Do you recognize this letter as being received by you, signed by the Plaintiff? A. Yes.

Letter marked Exhibit No. 7.

Q. You got that letter and the Plaintiff said it was full of reservations? A. Yes.

Q. And he would not take it and returned it to you, When was it that you were appointed to the office of Land Commissioner of the E. & N. Railway Company? A. In May, 1894.

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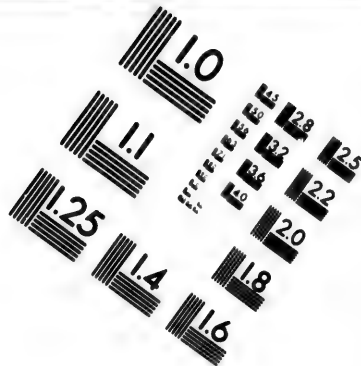
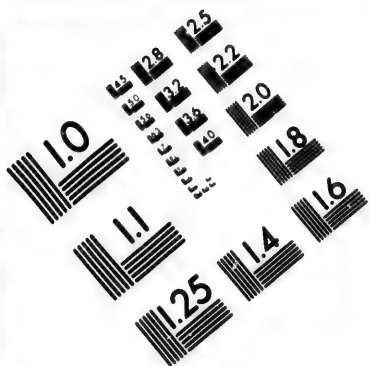
Q. How were you appointed, by resolution? A. No, by instructions of Mr. James Dunsmuir.

Q. Verbal instructions? A. Verbal instructions.

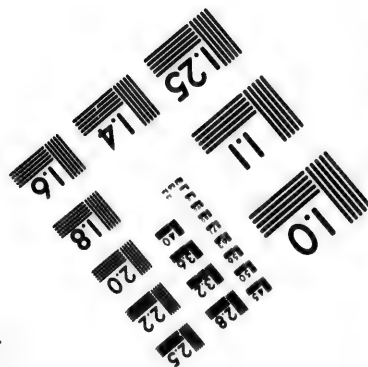
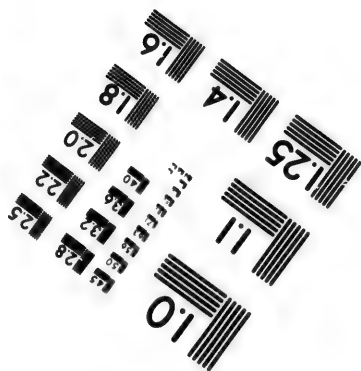
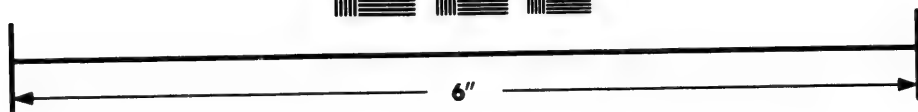
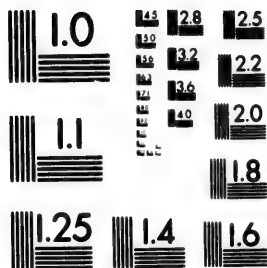
Q. Any appointment under the seal of the company? A. No.

Q. Nor resolution of the Company? A. No.





**IMAGE EVALUATION
TEST TARGET (MT-3)**



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(716) 872-4503

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Q. There never had been any misunderstanding between your company and Mr. Hobbs as to what land he was to get? A. As far as I know there was never any dispute.

Q. I call your attention to this letter of the 28th of April, written by the Plaintiff to you. You received that letter (handed to witness). A. I did.

Q. And it was in compliance with that letter that you sent out the deed of conveyance. A. Yes.

Letter marked Exhibit "No 8."

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Q. Now, had you any other dealings with the Plaintiff with reference to this land?

A. I do not think so.

Q. This is all that has transpired between you and the Plaintiff as far as you know?

A. Everything so far as I know.

Q. Do you notify the public at the present time in any way that you do not sell lands except reserving the coal? A. We have no advertisement in the papers with regard to the sale of agricultural lands, in the papers at the present time.

Q. Do you still issue your agreements for sale in the same way? A. No.

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Q. You have got different agreements now? A. Special printed forms.

Q. Settled forms of agreement? A. Yes.

Q. And they notify the intending purchasers of the reservation? A. The form states that all sales are subject to the usual reservations contained in conveyances from the Esquimalt and Nanaimo Railway Company prior to the date of the agreement.

Q. And those usual reservations are the ones put in to that conveyance made to the Plaintiff? A. Exactly. The usual reservations mean all the reservations.

Q. Are you familiar with that pigeon hole place of record that Mr. Trutch spoke of, 30 where papers relative to sales of land— A. Mr. Trutch, I think, referred to a drawer not to a pigeon hole, these papers were kept in a special drawer.

Q. Relative to sales of land? A. Yes, the pigeon holes that he was speaking of at that time were only for the filing away of papers in connection with pre-emption records—applications for pre-emption records. The papers in connection with the sales were not kept in the same pigeon holes as the record papers. But they were all filed away together in one place.

Q. In a place of record, a place of filing? A. Where I had access to them.

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Q. And the directors of the Company have access to them? A. They would not know where they were, without being able to open the vault and go to the drawer.

Q. When the vault was open? A. If they went and ferreted around they might find them, but otherwise they would not know where they were.

Q. They could easily call one of the employees? A. If they wished to see them they could ask to see them of course.

Q. They were the Company's records? A. They were the Company's records.

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Q. And not any special officer's private records. A. No, papers belonging to the Company.

Q. Did you know as a matter of fact that you retained a copy of this writing of the 28th November, 1889, with Mr. Hobbs? A. Certainly, the tick in the top corner of it in red is made by myself, showing that it has been entered. There is a tick in the duplicate that Mr. Pooley has and that shows that I entered it, that shows that the entry was made by myself.

Q. What entry is that? A. The entry of the first payment.

Q. And it is in the book that we just referred to? A. Yes, land sales books in Bright District, that is where that entry was first made. 10

Q. A copy of that writing of the 28th November, 1889, has been continuously in the office of the Defendants? A. It has been in my charge until lately—until it was handed to Mr. Pooley.

Q. When you say in your charge, it was in the offices of the Company in ordinary course, wasn't it? A. But I had charge of all—I always have had charge of all document and letters and papers. 20

JAMES DUNSMUIR, being duly sworn, testified. Examined by Mr. McPhillips:

Q. Your name, Mr. Dunsmuir? A. James Dunsmuir.

Q. And you are now Vice President of the E. & N. Railway? A. Yes.

Q. Would you tell me when you first became connected with the E. & N. Railway Company in any official capacity, I mean as a director; was it prior to, say the 28th of November, 1889? A. At the start of the E. & N. Railway Company, was one of the 30 promoters.

Q. And were you one of the first directors? A. One of the first yes.

Q. And you have continued to be a director since? Yes.

Q. I think that the Railroad Company took shape in 1883 or 1885? A. 1883, I think.

Q. You think that was in 1883 or 1884, Mr. Dunsmuir? A. 1883, I think.

Q. Do you know the composition of the Board of Directors in 1888, do you remember? has it changed, or what was it at first? A. There was my father, Charles Crocker, John Bryden and myself, and I think Charles Crocker; I think there were five. 40

Q. There were two Crockers? A. Yes.

Q. And your father and yourself and Mr. Bryden? A. Yes.

Q. Do you think that was the composition of the board in November, 1889? A. What time in 1889?

Q. In November it would be. A. Just then, my brother—

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Q. Alexander Dunsmuir? A. Yes. C. P. Huntingdon, Charles F. Crocker, and myself—I forget; there is another one.

Mr. Pooley: Q. Mr. Bryden? A. And Mr. Bryden that is it.

Mr. McPhillips: Q. That would be the composition of the Board in November, 1889? A. Yes.

Q. Well now, Mr. Dunsmuir, was there any Managing Director in say November, 1889, and who was acting as Managing Director? A. Well, there is no Managing Director at present.

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Q. By specific appointment there was none? A. No Managing Director, no.

Q. Had the Railway Company any by-laws? A. Yes.

At the request of Mr. McPhillips, Mr. Pooley produced by-laws of the Defendant Company.

Q. Well, then, you had by-laws. I see it says here under section 41 of the by-laws that 3 shall form a quorum? A. Yes.

Q. There was not a quorum in this Province, was there three of you? A. No, not all the time.

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Q. Well, has that Board, as constituted in November, 1889, continued up to date? A. Yes.

Q. Is that the present Board? A. The present Board, yes.

Q. Well, now, Mr. Dunsmuir, in November, 1889, were you also acting as Vice-President then of the Company? A. Yes.

Q. And were you acting as Managing Director, or what arrangement was there? There was no Managing Director? A. I was acting as Managing Director and Vice-President.

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Q. And Vice-President? A. Yes.

Q. Do you remember anything of the appointment of Mr. John Trutch? A. John Trutch, he was appointed in my father's time.

Q. He was appointed prior to you coming on the Board? A. No, not prior to my coming on the Board.

Q. Yes, you were on the Board at the first and your brother Alexander came on later? A. He came on later.

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Q. Are you acquainted with the fact of his being appointed Land Commissioner? A. John Trutch, yes.

Q. Was it at any Board meeting? A. No.

Q. You do not remember the circumstances of his appointment then? A. No, I do not remember the circumstances of the appointment.

Q. Do you know whether there is anything in the minutes of the meetings of the board with reference to his appointments? A. Nothing.

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Q. There are none? A. No, none.

Q. At any rate, John Trutch was appointed Land Commissioner? A. He was appointed.

Q. You know that? A. Yes.

Q. And was acting as such on the 28th of November, 1889? A. Yes.

Q. Is his appointment, to your knowledge, under the seal of the Company, or in writing? A. No, verbal.

Q. It was verbal. But you are acquainted with the fact that he acted as Land Commissioner for the Defendant Railway Company? A. Yes.¹⁰

Q. Now, dealing with the subject matter of this action, Mr. Dunsmuir, when did you first become aware that any of the lands of the Defendant Company had been agreed to be sold to Frank Vicker Hobbs? A. I cannot say the time.

Q. You do not remember the exact time? A. No, I do not remember that.

Q. Was there any duty cast upon the Land Commissioner, to your knowledge, whereby he was to lay before you a list of land sales made from time to time? A. No.²⁰

Q. And, of course, then, none would come before you in ordinary course? A. Oh yes, come before me.²⁰

Q. They did come before you? A. Yes; not lists, though.

Q. Do you remember when it was first called to your attention, that is, the sale to the Plaintiff? A. No, I do not remember.

Q. Well, do you remember generally? Was it your custom or the custom of the Board of Directors to take up annually the land sales made by the Company? A. No.

Q. It was not. I suppose you took up annually, though, your expenditure and receipts? A. Yes.³⁰

Q. Would not the money received from land sales come under your notice that way? A. No—in which way.

Q. Well, were your annual expenditure and receipts—did you keep your railway matters separate from the land sales? A. Yes, the land sales were kept separate from the railway matters.

Q. Separate from the railway matters? A. Separate from the railway matters.⁴⁰

Q. You do not think that you became annually acquainted with the land sales made? A. Oh, the number of acres sold, yes I did, the lump sum; I did not know any individual.

Q. Well then, when really did this matter of the claim of the Plaintiff first come under your notice, then? He has now brought an action to obtain the land free from any reservations? A. I could not say exactly say the date.

Q. Well, it was prior to the commencement of the action, I suppose. A. Yes.

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Q. Well, did you have any conversation with the Plaintiff about it? A. No, not with him.

Q. No. Well, did you pass judgment upon it in any way as to what should be done? A. I told Mr. Solly what to do—the Land Commissioner.

Q. You instructed Mr. Solly what should be done? A. I instructed Mr. Solly what to do.

Q. Well, are there any minutes of the Board of Directors dealing with the claim of the Plaintiff to this land at all? A. No. None. 10

Q. There are no books of record of the Company in which are recorded any inspection by the Board of Directors requiring an annual report of the Land Commissioner of the sales made? A. No, not necessary.

Q. It was not the custom to require that? A. No.

Q. Do you remember that he ever made any detailed report of the sales made? A. Of the sale?

Q. Yes, of land. A. Oh yes, of the sales of land; it would show it in our yearly report of the amount of land sold. 20

Q. But it would only be— A. In a lump sum.

Q. It would not be sold to A, sold to B, sold to C? A. No, not the name at all, it would just be the number of acres sold.

Q. I suppose when you took the matter up of the Plaintiff's claim to certain land, which is Lot 6, Douglas District, you went into the whole matter with your new Land Commissioner, Mr. Solly, did you? A. Yes.

Q. And arrived at a certain conclusion? A. Yes. 30

Q. And he was directed to carry it out? A. To carry it out.

Q. One part of the business of the Defendant Company is to sell lands, is it not? I mean you have large land tracts, have you not? A. Yes.

Q. I mean to say, you are a Railway Company, and then again you are holders of large tracts of land? A. Well, that is in the railway belt.

Q. I mean to say, in carrying on your business you carried on a railway business and besides you carried on a land department? A. Yes.

Q. And you have done that right from the commencement? A. Right from the commencement, yes. 40

Q. And you had a staff for the Railway Department, and a staff for the Land Department? A. For Land Department, yes.

Q. And that continues up to date? A. That continues up to date, yes.

Q. And John Trutch was appointed for the purpose of managing the Land Department? A. Land Department.

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Q. Well, there is no contest, as I understand it, on your own view of the matter with the Plaintiff, about giving him the particular land in question, but subject of course to the reservations? A. To the reservations, yes.

Q. Have you read over the agreement of sale, Mr. Dunsmuir, or this writing I will call it—Mr. Pooley objects to my calling it an agreement of sale—but this writing of the 28th of November, 1889, with the Plaintiff? A. The receipt?

Q. Yes. A. Yes, I have seen it.

Q. You have seen it and read it over? A. Yes.

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Q. What I want to get at particularly, Mr. Dunsmuir—when was it that this Plaintiff's application first came under your notice? I might assist you perhaps; it has been sworn already. Mr. Solly says at one time you called him in and went over this particular matter in connection with the coal discoveries? A. Yes.

Q. And you wanted to find out what persons had been sold any land in that neighborhood. It would be then, would it? Q. It might have been then.

Q. Or it might have been before that? A. I couldn't say, I forget about that.

Q. That would be 1895 was when that came up? Do you remember when first Mr. Pinder made some surveys up in that neighborhood? You remember when the first coal was discovered? A. Yes, that would be 1895, I think, or 1896, I think it was 1895.

Q. First, I understand, Mr. Dunsmuir, you took it that—the first view you seemed to have formed, was, that the agreement had lapsed? A. Yes.

Q. That, I think, was the first? A. Yes.

Q. You thought it had lapsed by virtue of delay on the part of the Plaintiff? A. Yes.

Q. Well then, I suppose of course, you had become acquainted then with the exact terms of sale, because you had a look to see how the payments were to be made? A. I became acquainted with what?

Q. How the payments were to be made? A. Oh yes, I understood.

Q. You knew the terms? A. I knew the terms, yes.

Q. Well, there was only the one agreement, though; one transaction with the Plaintiff, was there? There were no two agreements of sale to the Plaintiff? A. No two agreements.

Q. There were no two agreements with the Plaintiff, two separate ones?

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Mr. Pooley: You mean two agreements in writing?

Mr. McPhillips: I mean there were no two different dealings with the Plaintiff, were there? A. I don't know, of course there was the dispute then raised. So in which way there were two different dealings I do not know. We only had one way of dealing.

Q. I mean, all the transactions that took place between the Defendant Company and the Plaintiff, was in reference to this purchase of land, was it not, of the 28th of November, 1889? A. Yes.

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Q. However, you never had any conversation with him, Mr. Dunsmuir, yourself?
A. No, I never spoke to him. Only when he and the lawyer came into the office, and wanted me to sign their agreement or their deed.

Q. Their deed? A. Yes. I told them no, I would not sign any other deed than the deed we issued, the E. & N. Railway Company deed; and we only sold the surface right.

Q. Dealing with that, Mr. Dunsmuir, I think Mr. Chartres Pemberton and the Plaintiff attended at your office with a deed? A. Yes, that is the one I am speaking of.

Q. They tendered a deed without reservations, without reserving the coal, etc? A. ¹⁰ Yes.

Q. And you refused to execute that deed? A. Of course I did, that was not the way we sold the land, that is, sold the surface rights.

Q. The only deed you executed was the one covering the surface rights? A. Yes, the usual deed that the E. & N. Railway has, and the deed that we have always made out.

Q. Do you know, Mr. Dunsmuir, whether or not it was a fact that the Plaintiff entered into possession of these lands shortly after the 28th of November, 1889? It is a ²⁰ fact seemingly that he built a cabin on the premises? A. He built a cabin, yes.

Q. Do you know as a matter of fact that the Plaintiff did go on the land and build a cabin on it? A. No, I could not say.

Q. You don't know that yourself? A. No, I could not swear that he did; I heard he did; I could not say that he built it; the cabin there, I have seen the cabin

Q. Now, dealing with the broad general matters of your lands, of which this is a part, Mr. Dunsmuir, of the Defendant Company's land; the Defendant Company owns a large tract of land, of which this is a part, you have the absolute title, have you not, to it? ³⁰ A. Yes.

Q. I mean to say, the E. & N. Railway Company own the land of which this particular land in question forms a part? A. Yes.

Q. Free from any reservation? A. Free from any reservations.

Q. Yes; that is, you have got a provision now whereby the purchaser signs a receipt admitting that reservations will be contained in the deed? A. Oh, no, we give a receipt having received a certain amount of money from a certain person, we put in surface rights, received on account of surface rights, on account of so many acres of surface rights, so ⁴⁰ much.

Q. That was not in vogue when the Plaintiff bought? A. No, it was not.

Q. Has that long been the practice of the Company? A. Oh, since some time ago.

Q. Some years, I suppose? A. Yes. That was after Mr. Trutch's time.

THOMAS SINCLAIR GORE, being duly sworn, testified. Examined by Mr. M-Phillips:

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Q. Your full name, Mr. Gore? A. Thomas Sinclair Gore.

Q. I believe that you were at one time Land Commissioner of the Defendant Company, the Esquimalt & Nanaimo Railway Company? A. Yes.

Q. Do you remember the time of your appointment; that is, was it in writing? A. My appointment?

Q. Yes. A. No.

Q. Verbal? A. It was verbal.

Q. By whom were you appointed for the Company? A. By both Mr. James Duns-¹⁰ muir and Mr. Alex. Dunsmuir, they were present at the time.

Q. They were directors of the Company, were they not? A. I believe so, yes.

Q. And your appointment was not then in writing, or under the seal of the Company in any way? A. No.

Q. Do you know whether the Board of Directors passed a resolution appointing you or not? A. I do not. They never informed me on the subject.

Q. And you do not know as a fact, whether that was done? A. I don't know it as²⁰ a fact, no.

Q. In October, 1891, it was that you were appointed? A. Yes.

Q. That would be some subsequent time to the agreement of sale—subsequent to any dealing by the Defendant Company with the Plaintiff, because that was the 28th of November, 1889.

Q. Well, now, after you were appointed, you exercised your duties as Land Commissioner of the Defendant Company, I suppose? A. Yes.

Q. For how long? A. Until May, 1894.

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Q. Until the month of May, 1894? A. Yes.

Q. Well, now, whilst you were exercising your duties as Land Commissioner for the Defendant Company, did any sale of land to Frank Vicker Hobbs come under your notice? A. Yes.

Q. Do you remember when it first did come under your notice? A. It was in a letter from him asking—I do not remember exactly what the text of the letter was.

Q. We know the contents. It was a letter of the 4th of April, 1892, an exhibit in one of the other examinations? A. Yes.

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Q. Then you wrote this letter, I think, in reply? (Letter handed witness). You received a letter from the Plaintiff, of the 4th of April, 1892? A. Yes.

Q. And you wrote that letter in reply, did you not? A. Yes.

Q. This is Exhibit "D" in the examination of the Plaintiff. When you got that letter of the Plaintiff's of the 4th of April, 1892, what did you do? Did you look up the records and find out what— A. Yes, I looked up the records to see what land he referred to.

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Yes.

Q. And, having found that, you wrote this letter, wrote this letter of the 6th of April? A. Yes.

Q. Do you remember bringing that to the attention of any of the directors then? A. No, I do not remember bringing it up before them. It was Mr. Dunsmuir I would have referred it to.

Q. Mr. James Dunsmuir? A. Yes, I do not remember having done so; I may possibly, but I do not remember it.

Q. Were you required to do so, exercising your duties as Land Commissioner? A. No.

Q. That is, you had entire management of lands and land sales; is that it? A. Generally speaking I had, yes.

Q. At any rate you do not remember whether you did. I notice in this letter you exercised some authority did you not; you advised him that he could employ a surveyor and have the land surveyed, did you not? A. Yes.

Q. And that was within your powers? A. Acting under general instructions, yes.

Q. In advising him that, you were acting under general instructions? A. Yes. 20

Q. That was within your power? A. That was within my power, at least I understood it so.

Q. I notice you enclose a tracing there. That is from examining the application I suppose, and a copy of the writing of the 28th of November, 1889, that was in the office you sketched it and put that red in there as indicating about where you thought the property might be? A. Yes.

Q. (Document handed to witness.) You are looking now at Exhibit "E," to the examination of the Plaintiff. You say that after looking at the records in the office—do you remember what was there now? A. There was Mr. Hobbs' application and some pencil notes made by Mr. Trutch in the Register.

Q. And what else? I suppose there was a copy of this writing of the 28th of November, 1889, was not that so—because we have had it stated there was, the receipt for the money? A. The receipt for the money; there was a copy of that in the office.

Q. You saw that at the time? A. Yes.

Q. That is called the writing of the 28th of November, 1889 (document handed to witness.) That is the original of what the Plaintiff has; I do not suppose you ever saw that before? A. I never saw that before.

At the request of Mr. McPhillips, Mr. Pooley produced a copy of the paper. Same was handed to witness.

The Witness: Yes, I believe that is it.

Said document was marked Exhibit "A" of this date.

Q. Amongst your papers you saw this paper, which is marked Exhibit "A"? A. Yes.

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Q. Which writing of course speaks for itself. It is a copy of a writing of the 28th of November; 1889? A. Yes.

Q. Then you saw the application, and this; and any other papers do you remember?
A. No, I do not remember any other papers in connection with it.

Q. And after reading those through and looking into the matter, you wrote this letter of the 6th of April, 1892? A. Yes.

Q. Now, are there any writings of yours in the books of the Company relative to the Plaintiff's purchase of land? A. Only my copy of that letter, I believe. 10

Q. In the letter book? A. Yes.

Q. Anything else? A. There is an entry, I think, in one of the registers.

Q. One of those little books there (indicating)? A. Yes.

Q. Of yours? A. Yes.

Q. I would like you to refer to it (book handed to witness). A. That is my writing there (indicating).

Q. At page 67 in Douglas District, you find what writing there; you might read it out? A. F. V. Hobbs. 20

Q. Read the top as well. A. Name, F. V. Hobbs.

Q. First you start with this (indicating). A. Number of Lot, 6. Name, F. V. Hobbs. Interest, 6 per cent. Acreage, 93—with a query after it, it was unknown, the quantity of land. Price per acre, \$3.00. This is just taken from the receipt you see.

Q. Headed terms of payment and dates when paid? A. First payment. Date when paid, 28th November, 1889. Amount paid \$120.

Q. Now, that entry is in your hand writing? A. Yes. 30

Q. And when do you think it was made? A. I think that was made after Mr. Hobbs had been to my office.

Q. When would that be? A. I think it was in the autumn of 1892.

Q. Autumn of 1892? A. I am not sure about the date.

Q. It would be after that letter of the 6th of April, 1892? A. It would be after that letter, yes.

Q. Well, you notice now you have entered it Lot 6. What lot was that; Douglas 40 District. How did you come to enter it up in that way? A. I think it was because it took in parts of different sections you see, and we got in the habit instead of going by the old section lines there, of giving it a lot number.

Q. That had been the custom of the Company? A. Yes.

Q. In fact, a previous number was 5, and that became 6? A. Yes. The book up to a certain place is numbered in townships, sections and ranges, beyond that they have given them lot numbers.

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Q. Do you know when they started to number them by lot numbers? A. The first one here is in 1887.

Q. Then you entered that as lot number 6. At that time when you entered it the survey had not been made, had it? A. No.

Q. The survey had not been made? A. The survey had not been made.

Q. And the survey has since been made? A. Yes.

Q. But that is since that time, is it not? A. Yes.

Q. Since your time of office. Do you know the lands in question at all? Have you¹⁰ been on the ground? A. No.

Q. Well, you recommended that the Plaintiff employ Mr. Priest as surveyor, or Mr. Fry? A. Yes.

Q. That is that either of them were satisfactory to the Defendant Company? A. Yes, I just named them as being surveyors in the vicinity.

Q. And they were satisfactory to the Company? A. Yes.

Q. Well, was any limitation of authority published in connection with your office²⁰ as Land Commissioner. You held it as Land Commissioner? A. Yes.

Q. There was no notification posted in the office to the effect that you had only limited powers? A. No.

Q. You were styled Land Commissioner, and held yourself out as such? A. Yes.

Q. Is that all you had to do with Mr. Hobbs? A. That is all, I do not remember having anything more to do with him than that.

FRIDAY, 18th June, 1897, 11 a. m. ³⁰

Court met pursuant to adjournment.

Mr. McPhillips: My Lord, yesterday in putting in the examination evidence, which I did rather hurriedly, I find I have made a mistake as to the evidence I put in on page 11 of Mr. John Trutch; I have put in the whole page, when my intention was to put in lines 1 to 10 inclusive; and lines 22 to end of page.

The correction was allowed by the Court.

Mr. McPhillips: Then I want to put in this further evidence of Mr. Trutch, page 41,⁴⁰ lines 25 and 26, page 42, lines 1 to 3 inclusive.

Then in Mr. Solly's evidence, on page 72, I put in line 22 to the end of page.

Mr. McPhillips: That is the Plaintiff's case, my Lord.

Mr. Pooley, here called on behalf of the Defendants, JOHN TRUTCH, who being duly sworn, testified. Examined by Mr. Pooley:

Q. Your name is Mr. Trutch? A. John Trutch.

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Q. What was your occupation in Victoria on the 28th November, 1889? A. I was Land Commissioner of the Esquimalt & Nanaimo Railway Company.

Q. When were you appointed to that position? A. The 1st July, 1888, I think it was.

Q. By whom were you appointed? A. The late Mr. Robert Dunsmuir, the President of the Esquimalt & Nanaimo Railway Company.

Q. Was that appointment in writing? A. No.

Q. When you were appointed to the position of Commissioner of Lands had you any 10 instructions given to you as to the dealings with those lands? A. Yes.

Mr. McPhillips: Before my learned friend goes into that I would like an objection as to its effect. I submit to your Lordship it would not bind the Plaintiff unless it was made known to him. Secret instructions given to the Land Commissioner are not binding upon the Plaintiff. My learned friend, if he wishes to use this as evidence against the Plaintiff, it seems to me, will have to undertake to connect it and prove that it was brought to the notice of the Plaintiff.

The Court: I shall accept the evidence, but I shall consider the point in giving judgment. 20

Mr. Pooley: Q. Now what were the instructions that you received from Mr. Dunsmuir with reference to dealing with the lands? First of all, Mr. Trutch, I ask you when you were appointed? A. In July, 1888 or 1887.

Q. I want you to be quite sure of that because in your evidence here you gave the right date? A. 1887, I think it was.

Mr. Pooley: The evidence that Mr. McPhillips has put in gives the right date.

The Court: You can prove the correct date of Mr. Trutch's appointment; he can 30 refresh his memory.

Mr. Pooley: Q. Now, Mr. Trutch, what were the instructions that were given you by Mr. Dunsmuir when you were appointed? A. To sell the land for \$3.00 an acre, reserving all minerals and coal.

Q. Was that the only authority that you had to deal with the railway lands? A. That was the only authority that I had.

Q. Have you always acted upon that authority? A. Always.

Q. Do you recollect about the time that the late Mr. Robert Dunsmuir died? A. 40 Yes.

Q. When was it? A. In April, I think, 1889.

Q. After Mr. Robert Dunsmuir's death were any instructions given to you with reference to the sale of lands? A. Yes.

Q. By whom? A. By Mr. James Dunsmuir.

Q. Who was he? A. He was the son of the late Robert Dunsmuir.

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Q. Mr. Robert Dunsmuir, the President of the Company. What position was Mr. James Dunsmuir holding at that time, do you know? A. He was acting as President of the Company.

Q. Well, what instructions did Mr. James Dunsmuir give you? A. He directed me to continue to administer the lands accordingly as I had been doing under the late President.

Mr. McPhillips: I assume that my objection goes to all this, my Lord.

The Court: Yes.

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Mr. Pooley: Q. Did you, Mr. Trutch, see the plaintiff in this case at any time in your office? A. Yes.

Q. Do you know when? A. On the 28th November, 1889.

Q. (Receipt, Exhibit C, handed to witness.) Look at that Mr. Trutch, will you? A. Yes.

Q. Is that the receipt that you gave to the Plaintiff? A. Yes.

Q. On the 28th November? A. On the 28th November, 1889.

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Q. Now at the time that the Plaintiff came into your office and got that receipt from you, had he any conversation with you? A. He must have a conversation with me.

Q. Did you at that time tell the plaintiff that the minerals and coal in the land were reserved? A. Yes.

Q. Did you tell the Plaintiff, when he came to you there, that the coal and minerals were reserved?

The Court suggested that the question was leading.

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Q. Well, what did you tell him, Mr. Trutch? A. I don't remember this Mr. Hobbs, personally, individually, his name, or his presence on this occasion, but it was my practice to tell all applicants for lands the terms upon which they could obtain them and it is therefore my belief that I must have told the circumstances to Mr.—the particulars of the land to Mr. Hobbs as I did to all other settlers; but I don't remember Mr. Hobbs personally. I have a recollection of his face but I cannot remember him as Mr. Hobbs or having been present on the occasion when this transaction took place.

At Mr. McPhillips' request the Stenographer read the question to and answer of Mr. Trutch as follows: "Did you at that time tell the plaintiff that the minerals and coal in the land were reserved? A. Yes."

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The witness: In making that answer I meant that answer to be a general one; because I have stated I cannot remember this man personally, and therefore I cannot swear that I have a recollection of telling him personally.

The Court: What I put down Mr. Trutch is this: I don't remember Mr. Hobbs personally, but it was my practice to tell all applicants that all minerals were reserved and I think that I must have told him the same. A. Yes, that is what I wish to say.

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Mr. Pooley: Q. Now Mr. Hobbs yesterday in giving his evidence stated that in the conversation he had with you in the office that you told him that he could pay the instalments on this land at any time; did that conversation take place with you, Mr. Trutch?
A. I certainly did not tell him that.

Q. Do you remember selling any land to any other person on that day? A. Yes.

Q. To whom did you sell it? A. A gentleman called Andres Keating.

Q. Did you shortly before this time, Mr. Trutch, sell any railway lands of the E. & N. Ry. Co. to Mr. Wardroper? A. Yes. 10

Q. Do you know where Mr. Wardroper is now living? A. He is now living in England.

Q. Did you in the course of the business in your office write a letter to Mr. Wardroper in May, 1888? A. I wrote a letter to Mr. Wardroper's brother.

Mr. McPhillips: Now I object, my Lord.

The witness: Mr. Herbert Wardroper.

Mr. Pooley: Q. In the ordinary course of your business? A. In the ordinary course of my business. 20

Mr. Pooley: Now, my Lord, I have shown here that Mr. Wardroper is absent from the Province in England and I have not the opportunity of getting the original letter; I ask your Lordship to allow me to introduce this letter in corroboration of Mr. Trutch's statement with regard to the instructions he received from Mr. Dunsmuir (citing 97 Ed. Taylor on Evidence, Sec. 335).

The Court: That is tending to corroborate his evidence. The witness has sworn to what his general instructions are; I do not think it requires any corroboration unless it is attacked. 30

Mr. Pooley: Q. That receipt you have just seen. Mr. Trutch, and looked at, was that the receipt that you usually issued in the office? A. Yes.

Q. In all transactions of this character? A. In all transactions of this character.

The Court: Q. The receipt that you gave in this case was in the usual form which you used? A. Yes, my Lord.

Mr. Pooley: Q. Look at that, Mr. Trutch (Exhibit "T" handed to witness). A. Yes.

Q. Now, is that the usual form of conveyance given by the Company? A. That is the usual form. That is the same as the ones that I was in the habit of issuing. 40

Q. The same that you were in the habit of using while you were Land Commissioner? A. While I was Land Commissioner.

Q. For transactions of this character? A. For transactions of this character. In fact the only ones that I issued. I issued no others but in accordance with that form.

Q. Yes. During your time there as Commissioner of Lands did you ever sell any coals or minerals? A. No.

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Q. Look at the land, Mr. Trutch, described in that conveyance, will you, in the conveyance, Exhibit "T" (doing so)? A. Yes.

Q. Now, will you look at your receipt, please? A. (Doing so.) Yes.

Q. Is the land described in that grant from the Company the same land that is set out in your receipt of the 28th November, 1889? A. Well I can scarcely judge from this plan, because there is no connection with the starting point that I mentioned in the receipt.

Q. Then look at this plan (Exhibit No. 1.) (Witness does so.) You can scarcely¹⁰ tell on this map; this map does not cover the whole of it. (Exhibit Z handed to witness) Now look at this map Mr. Trutch, which is in evidence and which I am subsequently going to prove by Mr. Pinder; and tell the Court if the land mentioned in the grant is the same as the land mentioned in your receipt? A. I have looked at the receipt, I read it, I have it in my mind.

Q. Now I will read the description of the receipt as you have given it here (reading same). Now are you a Provincial Land Surveyor? A. Yes.

Q. In your opinion as a land surveyor, where would that description place that land upon the map before you? A. It places it where it is shown here in blue.²⁰

Q. That is on the plan marked Z? A. Yes, marked Z.

Q. Did you, Mr. Trutch, during the time that you were in the office, change the position of that land at all? A. Yes.

Q. How did you come to change it? A. In consequence of my finding on the survey of Lots 1, 2, 3, 4 and 5, which were all made at the same time or all connected together; finding that the land referred to in that receipt was covered in that receipt by some of those surveys, I, therefore, moved the claim; I made a note moving it a little further east, closer to Stark's claim.³⁰

Q. Did you make any memo. or entry at all in the books of the Company? A. I did. I put his name in—made a memoranda in pencil in the two sections in Douglas District, 8 and 9 west of Stark's. I think they were, I won't be certain. Yes, 8 and 9 is the number of the sections, Range 8. That was intended as a memorandum to show that there was a claim on that land in case it should have to be dealt with in the office.

The Court: Q. That was in consequence of the survey you found on what lot? A. Of Lots 1, 2 and 3.

Mr. Pooley: Now look at your book, what book is that? A. (Looking at book)⁴⁰ This book is a Register of Douglas District.

Q. Do you see any entries in that book? A. Yes.

Q. What do you see? A. I see an entry in Section 8, Range 8, and Section 9, Range 8, in Douglas District, in the name of Frank Vicker Hobbs, in my writing in pencil.

Q. When did you make this, Mr. Trutch? A. Well, I believe I made it on the—I might find—on the return of these surveys and their being plotted and placed on the

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map that the land applied for by Mr. Hobbs was covered by those claims; and that I then—there is a memorandum to show that there was land there in the neighborhood—that there was a claim of Hobbs'. I put it there in pencil in the Register Book in order that it might be a guide in dealing with the land.

Q. Looking at that plan Mr. Trutch and looking at the plan on the conveyance of the first of May Exhibit T—where is this Lot situated on that plan before you? A. This is situated in Sections 10 and 11 and Range 8.

Q. The lot described in the conveyance, Exhibit T, that is on that plan marked 10 what? A. In Sections 10 and 11, Range 8, Douglas District, and a portion of it in Cranberry District (referring to Exhibit Z.)

Q. But where is it shown on that map? I want to know where this land is shown on that map before you? A. It is shown here to be north and east of the land that the receipt was given for.

Q. North and east of the land the receipt was given for. What is it colored? A. Yellow.

Q. Colored yellow. And is the piece of land shown in the conveyance, Exhibit T. 20 The same as the land mentioned in your receipt? A. No.

CROSS-EXAMINED BY MR. MCPHILLIPS:

Q. Now Mr. Trutch you remember being examined by me before the Registrar? A. Yes I do.

Q. And you remember my asking you whether you had told the plaintiff anything as to the reserving minerals or other reservations? A. I don't remember particularly.

Q. I will now refer you to page 23 of your examination: "However, you did not put it in the writing. Do you remember telling Mr. Hobbs that you only sold him the 30 surface? (A.) I do not remember telling him personally." A. Yes.

Q. That was your answer then, was it not? A. Yes.

Q. And that is your answer to-day, is it not? A. Yes.

Q. Therefore your answer at the commencement of your examination in chief by Mr. Pooley is not to go except as qualified by you?

The Court—That is what Mr. Trutch said in his examination in chief.

The Witness: What I understood and intended was I said personally that— 40

The Court: You merely spoke of your general custom? A. Yes.

Q. And you assumed that you must have followed your usual custom? A. Yes

Q. Had no reason to depart from it.

Mr. McPhillips: Q. Whilst you say that as to the general custom, you do not connect the Plaintiff at all with any statement of that kind? A. Yes, I do—it is my belief that I told him.

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Q. Your belief? A. Yes; that I did not make an exception in this case; that I must have told him as I told others. But what I meant was, I could not remember him personally.

Q. You cannot remember telling him personally? A. That is what I meant; that I could not remember telling him individually in connection with this case, that I did not remember him.

Q. And you did not put it down in the agreement of the 28th November, 1889?
A. Put what down?

Q. Any reservations? A. I did not.

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Q. No. Now you have looked at this plan, which my learned friend showed you, and you say that in your opinion that if the land had been described—you assumed that when it said west of Louis Stark's Crown Grant, it was to be west then within what lines?

A. Within what lines?

Q. Yes. West? A. West from his Crown Grant.

Q. You put it within lines which would run parallel with the north and south boundary of Louis Stark's Crown Grant, did you not? A. Yes.

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Q. You assumed when you said west, it would be west within the parallel lines of the boundaries of Louis Stark's Crown Grant? A. Yes.

Q. North and south? A. Yes.

Q. Therefore you read west, strictly speaking, as astronomically west, no variation at all? A. No; I understood west to mean west

Q. Will you say now, Mr. Trutch, at that time when you wrote out that receipt that you meant it to be so stereotyped, so unalterable, that it had to be absolutely west astronomically without a variation? A. Yes, the boundaries of these lands had to run to 30 the cardinal points, as they--

Q. No, but confine yourself to my question. I say, did you when you wrote west mean that west should be so unalterable that it had to be west within those lines that you mentioned? A. Yes.

Q. You maintain that? A. I meant west to be west.

Q. Although you knew the purchaser, Mr Hobbs, was not a surveyor? A. I knew that he was not a surveyor. I settled this in consultation—the position of this in consultation with him in the office—this application before me.

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Q. This application before you, exactly—that is what I want to get at? A. And I had to settle it in consultation with him because my instructions were that the dimensions of the claims were to be 40 by 40 chains, or 20 by 80. And as he said nothing about it, the shape of it, in his application I must have settled the terms with him in the office, the shape of the claim, when I gave him this receipt.

Q. However, Mr. Trutch? A. Otherwise, of course, I did not know the shape about it, anything more than it naturally had to follow 40 by 40, or 80 by 20, and therefore I must have fixed on this, and he having accepted it I must have arranged it with him.

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Q. I am not dealing with that Mr. Trutch. If you will kindly follow my questions. I bring you to the application. The specification reads as follows: (reading description from application) You have just told me that you had this application before you? A. Yes.

Q. Therefore you had notice of the fact that the Plaintiff Mr. Hobbs had been upon the ground? A. I had notice of it.

Q. Yes, that he had been on the ground? A. Yes.

Q. From him? A. Yes

Q. That is what it says; it speaks of a ridge and Berkeley's Creek, and a corner post and a swamp? A. Yes.

Q. Your intention was to give him the land he had been on and was applying for? A. The land that he was applying for.

Q. Certainly. A. As stated in his application.

Q. As stated in his application. The intention was to give him land that he had been on and was applying for and no other land? A. Commencing from the starting point that he named to give him 160 acres as described by him.

Q. But you had not been up in the country there at all? A. No.

Q. You did not know anything about its local conditions? A. I did not.

Q. You knew though that it was a sparsely settled and timbered country? A. A timbered country; I had reason to suppose so and believed it to be.

Q. And you made out the best description you could from his application? A. Yes, on consultation with him.

Q. And it was your intention throughout to give him the land that he was applying for? A. Yes.

Q. Now, you told my learned friend, Mr. Trutch, that this land is carried out according to this hard and fast rule that you were asked— A. You must have some rules to go by.

Q. We are coming to hard and fast rules now, but they were rather loose rules in 1889, were they not, loose rules in 1889, had to be? A. Yes.

Q. You would fetch it out to where it is marked blue on the map if you carried it out on this hard and fast rule? A. Yes; that is according to the written description.

Q. Now, I was a little astonished to hear you say this to my learned friend, that when you found that the land could not be placed where the blue mark is here—you moved it over and put it where the brown was? A. I moved it nearer to Stark.

Q. Well, was not the Plaintiff concerned with the question at all? As to whether his land should be where it is blue or where it is brown, or where it is yellow? You just did that yourself? A. I just did that myself.

Q. At your own motion? A. It was my own motion.

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Q. It was not your intention to give him a different farm than what he was on and applied for? A. The description stating and calling for about two miles west of Stark's claim; the land at two miles being occupied, I moved him half a mile or so nearer to Stark.

Q. Yes. A. On the the same line that he gave, or west from Stark's place.

Q. At the same time, Mr. Trutch, the Defendant Company according to these hard and fast rules, would have been compelled to convey him this blue block, would not that be the fact? A. If it was unoccupied.

Q. If it was unoccupied. There is nothing about occupied about the agreement of the 28th November, 1889? A. Well, it was all indefinite, there had been no surveys there at the time. He had not had it surveyed. 10

Q. The fact of the matter was the Company could not convey him the blue block? Wasn't that the fact? A. It belonged to someone else.

Q. They could not convey it to him? A. They could not convey it to him.

Q. Therefore it was to the advantage of the Company to put him somewhere else, wasn't it? A. I moved him nearer. 20

Q. It was to the advantage of the Company, though, to put him somewhere else? A. That being occupied I moved him here (indicating); if he had declined to take it he could have received his money back again.

Q. Yes; that is your notion of that? A. That is my notion of that.

Q. You never communicated the fact to him? A. No, I did not.

Q. Never thought that it was of sufficient importance to advise him? A. No.

Q. Throughout all these years that you had placed him— A. So much nearer—to notify him that that land was occupied. 30

Q. You never notified him that you had moved him over? A. No, I did not.

Q. Did you ever make a plan and move him over like that on any plan in the office of the Company? A. I don't remember that I did.

Q. This is just a sketch that is made now? A. There is a—where is that—your plan? (Exhibit "T" handed to witness). I see there is a pencilled plan that has been put here.

Q. That is in its correct position? A. That is in its correct position, oh yes. 40

Q. That is according to the Plaintiff's contention? A. Oh, but there has been one down below apparently. However, I did not put that there. I see that is in the other place.

Q. You say, in any case, that you did not communicate to Mr. Hobbs the fact that you considered that he was now a little further east than he was? A. I did not.

Q. The Company did not send any agent or surveyor into this territory to find out where Mr. Hobbs really was located? A. No.

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Q. They did not? A. Not that I am aware of; not during the time I was there, except the survey that was made of those five lots, that was the first information we had of the position of those lots.

Q. You know when you agreed to sell this land to Mr. Hobbs that he was going to use it for agricultural purposes did you not? A. Yes.

Q. Now knowing that fact, didn't you think it was a little arbitrary to move his farm around without any notice to him at all, and he would be going on in the face of his application and making improvements and so on and find out that his farm was in a very different place? A. Well you see it was necessary to move him, the ground proved to be occupied by other parties. 10

Q. Therefore he could not be there? A. I could not move him—

Q. He could not be there because it was occupied by others. A. He could not be there legally. He may have been in possession of some of the land claimed by the other parties, I could not tell

Q. But the assumption would be that he would not be at the blue point because it was occupied by others? A. No, I do not see that at all. He may have been there in occupation of property, of the same land, I could not tell you that. 20

Q. But even if he were and had his farm there it would still be very arbitrary to move him would it not? A. Because it frequently happens that there are two or more settlers on the same piece of land, or on portions for that matter.

Q. You know as a matter of fact now, Mr. Trutch, that Lots 2 and 3 were occupied by settlers, were they not, at that time? A. I didn't know where they were; I knew that there were settlers there, but I didn't know where they were, the position of them, until those surveys came in.

Q. Therefore he could not have gone on to Mr. Ross' lot, or on to Mr. Holmes' lot, ³⁰ he would have been a trespasser there, wouldn't he? A. I suppose he would.

Q. The fact of the matter is that these lots in this neighbourhood were described as Lots 1 to 6, and we are at 6 now in this section? A. Yes.

Q. And when you conveyed the land, the first one was Donahue, because it is No. 1? A. Yes.

Q. And he was the first settler? A. I think so.

Q. And the next one was two, and he was the next settler? A. Yes. It does not ⁴⁰ follow from the numbering of the lots that they are the date of acquiring the property—it does not follow—they were numbered in that way by the surveyor.

Q. No. 1 was Donahue, No. 2 Ross, No. 3 Holmes. No. 4 Blood, No. 5— A. Five is there; it is not mentioned.

Q. 5 is not mentioned? A. That was surveyed at the same time as the others and allotted to a man called Anderson, and he transferred subsequently to other parties and the title was not issued to Anderson, but it was surveyed to him and numbered.

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Q. 6 is Mr. Hobbs. In consecutive order when Mr. Hobbs' land was to be conveyed to him it became Lot No. 6, did it not? A. It became Lot No. 6 in the District. It is the next Lot that was surveyed in the District, and entered as No. 6.

Q. As a matter of fact you entered it in the book right away as Lot 6? A. I did not.

Q. Perhaps you yourself did not? A. Because it was not surveyed.

Q. You referred to this book to my learned friend, your pencil memoranda putting the land in Range 8, Section 8, and Range 8, Section 9? A. Yes.

Q. That is just you assumed that he would be over here? A. I made that note after the surveys came in. ¹⁰

Q. That is when you moved it over? A. And I was then able to get some idea.

Q. Some idea, yes. A. Of where the land that was taken up was, that it was so much nearer.

Q. And you put it in here, Mr. Trutch? A. I had no idea where Mr. Hobbs' land was, but that being occupied there I assumed that the land two miles west was so much nearer to Stark's.

Q. You have told us how you did that, you just moved him nearer to Stark's? A. I moved him nearer to Stark's. ²⁰

Q. And you were not very sure about it, Mr. Trutch, because you put it down in lead pencil? A. I put it down in lead pencil as a guide to anyone in the office having to deal with those sections, that they might see there was a claim on it.

Q. If you had been sure of it you would have put it in ink? A. As soon as it was surveyed then I should have made it permanent in ink and filled that up as others are done.

Q. Now, as a matter of fact, this Lot 6 turns out to be portions of 10 and 11, does it not? A. Yes. ³⁰

Q. And a portion of Cranberry District? A. Yes.

Q. Now, you look in this book that my learned friend showed you and you find 10 and 11 vacant still, don't you? A. Yes.

Q. Still vacant? A. 10 and 11 are still vacant.

Q. And the Company, now in the light of the facts that have developed here, Mr. Trutch—you can see that the Company has not thought that Mr. Hobbs really was on 10 and 11? A. I cannot say that. ⁴⁰

Q. Some of the other officers can. Do you not know—you told my learned friend where Lot 6 was? A. I can see where it is on the plan.

Q. You find now that he is really on 10 and 11? A. That that lot coloured yellow is on 10 and 11, I see that.

Q. That is, Lot 6 is on 10 and 11? A. Range 8.

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The Court: Q. What is now on Exhibit "Z" marked Lot 6 "Hobbs" is by another system of survey of Sections 10 and 11? A. Section 10 and 11, Range 8, Douglas District.

Q. How do you know Mr. Trutch that what is now shown as Lot 6 on Plan "Z" is by another system of survey Sections 10 and 11 Range 8? A. Only—it is not really on sections—it has never been surveyed; Douglas District has never been surveyed at all.

Q. How do you know? A. It is only on paper to show.

Q. Where is the paper? A. The object of my making the memorandum here in pencil with reference to Sections 8 and 9, Range 8, Douglas District, was to designate and show that that land in that locality was set apart for Hobbs. This being occupied and these sections never having been surveyed, the only use to describe this land in the book or register was of these sections in Douglas District here in blank here and I put down in pencil on that portion and in order to designate it in the book I had to call it Sections 8 and 9 in this district to show that that land was covered by the claim of this man in case it was applied for.

Q. Where are 10 and 11? A. They are there (indicating) 10 and 11 are there (indicating) 8 and 9 are there (indicating). That is the supposed boundary line of Cranberry District, the dividing line, but it has never been run.

Mr. McPhillips: Q. These are all the entries that you made yourself, Mr. Trutch? A. These are the only entries that I made in the books.

Q. And that is just in lead pencil? A. That is just in lead pencil.

Q. Well, now there was another matter found to be in error in the agreement. I see you referred to Bright District? A. Yes.

Q. There was never any question about that? A. No, there was never any question. 30

Q. You knew that was a mistake, and it ought to have been Douglas District? A. 35

Q. In the agreement it mentions Bright District, and there was never any misunderstanding about that; it was always Douglas District? A. No; it was always Douglas District.

Q. And then, of course, this agreement had to be looked at with a little elasticity after all? A. At that time the districts were unsurveyed.

Q. You did not stick closely to the question of Districts as you did to the parallel lines to produce them? A. What? 40

Q. You did not stick as closely to the question of Districts as to the parallel lines? A. No, I made a mistake there with regard to Bright, evidently. I must have written it. But as far as the description of the land is concerned, it is placed—its position is placed by the connection given from the corner of the Crown Grant of Louis Stark's claim, which is a surveyed and located tract of land in Cranberry District. And the connection of course is with that.

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Q. I believe when you were appointed Land Commissioner, Mr. Trutch, some published advertisement appeared in the press? A. Yes, soon afterwards.

Q. Have you got a copy of that? A. I have a pencil copy of it here which I took from the Colonist Office. Do you wish me to read it?

Q. Yes, I think I would like it to go in. A. (Reading.) "Esquimalt and Nanaimo Railway Company, Land Department. Notice to Claimants. Under the Act relating to the Island Railway, the Graving Dock, and the Railway lands of the Province, the Company is now prepared to issue conveyances of title to all claimants entitled to the same under the provisions of the above Act, and who have fulfilled the requirements of the British Columbia Land Act, 1884. R. Dunsmuir, President. John Trutch, Land Commissioner, Victoria, B. C., July 25th, 1887." ¹⁰

Q. Now, that appeared when and where? A. In the Colonist of the 25th.

Q. Of July, 1887? A. Yes; July the 25th or 26th; it might have been published the next day.

Q. You told me Mr. Trutch, in the Examination, speaking of this record, and that name, Frank Vicker Hobbs, in pencil there at page 59 of the book. I asked you this question on page 20: "(Q.) But these entries you are talking of now would be when the sale was finally completed by the issuing of the deed? (A.) When I had the survey made and I could describe it as a permanent record." A. Yes; then I filled up the Register in ink ²⁰

Q. In ink, yes, but you put it in while it was in its embryo state? A. Yes.

Q. In pencil. And it was to be crystallized afterwards by putting it in writing when the survey was made? A. Yes.

Q. And of course there might be a variation as to its position? A. There might be a variation as to its position. It might be found to be in another section when it was surveyed. ³⁰

Q. Yes? A. Or in another position rather, or section.

RE-EXAMINED BY MR. POOLEY.

Q. My learned friend asked you here about if the Company sent out a surveyor to survey this land for Mr. Hobbs. You said they did not send one. What was the custom of the Company? A. The custom of the Company was to accept—to allow the settlers to appoint their own surveyors subject to approval by the Company.

Q. And they made their own surveys? A. And they made their own surveys. ⁴⁰

Q. With reference to this application here of Mr. Hobbs, you could not tell that land was occupied until the other surveys came in? A. I could not tell, of course, I knew nothing. All I knew about it was what he told me.

Q. You have spoken about a notice advertised in the Colonist? A. Yes.

Q. That the Company was prepared to issue grants to all claimants of land who had fulfilled the requirements of the B. C. Land Act of 1884. Was that with regard to

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sales? A. That was with regard to settlers under the pre-emption. That was to notify the settlers that those who had not received their Crown Grants while the lands were being administered by the Provincial Government would now receive them from the Company.

Witness stands aside.

THOMAS SINCLAIR GORE, being duly sworn, testified. Examined in chief 10 by Mr. Pooley.

Q. Your name Mr. Gore? A. Thomas Sinclair Gore.

Q. Were you at any time a Commissioner of the Defendant Company? A. Yes sir.

Q. Land Commissioner? A. Yes.

Q. When were you appointed that, do you know? A. In October '91

Q. During the time that you were Commissioner there had you anything to do with the Plaintiff here, Mr. Hobbs? A. Yes, I remember Mr. Hobbs coming to my office once. 20

Q. Do you remember his writing you a letter? A. Yes.

Q. That letter is in evidence here, I forget the date of it, Exhibit "D"—4th of April, 1892 (handed to witness). Just look at that letter, will you; did you receive that letter? A. Yes.

Q. (Reading the letter.) Now in reply to that letter, did you send Mr Hobbs a plan? A. Yes, sir.

Q. (Plan handed to witness, Exhibit "F.") Is that the plan you sent him? A. Yes sir. 30

Q. How did you come to make out that plan, Mr. Gore? A. I hunted up what information we had about Mr. Hobbs' application; and found his application in the book, and also Mr. Trutch's entry in Section 9 and 10; and from that I made this sketch.

Q. From that you made that sketch? A. Yes.

Q. And you sent that to Mr. Hobbs? A. And I sent that to Mr. Hobbs.

Q. Did you enter that on any plan in the office? A. I think I put his name on 40 the place on the plan.

Q. (Plan handed to witness.) Now did you put his name on that section—on that plan that you sent him; on any plan in the office? A. I think I did; I think I put it in this.

Q. On this piece? A. Yes.

Q. Corresponding with the plan sent? A. Corresponding with the plan sent; it was my motion to do that.

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Q. Do you see any reminder of the mark you made there, now? A. Yes I do.

Q. What is on there? A. I cannot make out the initials but I can see Hobbs, I see some marks about that; I can see the name of Hobbs here distinctly.

Q. That is in your writing? A. I think that is my writing, yes; it is not clear enough to be very sure of it, but I think it is.

Q. And that is the land that you thought at that time corresponded to his application? A. Yes, that is the nearest land.

Q. According to the application Mr. Trutch had left in the office? A. Yes. 10

Mr. Pooley: I will put this in as an Exhibit.

Document marked Exhibit No, "3."

Q. Now did you afterwards see the Plaintiff? A. Yes sir.

Q. When was that? A. It was in the summer or autumn of 1892.

Q. Did you make any alteration of the position of that land after you had seen the Plaintiff? A. Yes,

Q. Where did you alter it to? A. Further North. 20

Q. Further North. To the piece of the land which the Company subsequently gave him? A. Yes.

Q. Why did you alter it? A. At the instigation of Mr. Hobbs whilst he was at my office.

Q. What do you mean by instigation? A. Well at his request.

Q. When you were in the office, Mr. Gore, had you any instructions about the sale of the Company's lands. A. Yes sir.

Q. What were they? 30

Mr. McPhillips: I object to that.

The Court: This will be subject to your objection.

Mr. Pooley: Q. What were your instructions there, Mr. Gore? A. In the sale of lands, that the minerals were reserved in all cases.

Q. Minerals were reserved in all cases. Did you whilst you were there sell any minerals or coal? A. No.

Q. Your authority was limited to— A. To the surface alone. 40

Q. To the surface rights. Your authority was limited to the sale of the surface rights? A. The sale of the surface only.

Q. Did you make any entries in this book in regard to this land? A. I believe so.

Q. That is your entry there, Mr. Gore (indicating)? A. Yes.

Q. What is your entry there; Mr. Gore? A. Number of lot, 6; name, F. V. Hobbs; interest, 6 per cent.; acreage, 93, query—it was uncertain; price per acre, \$3 00; terms of payment, 1st payment date when paid 28th November, 1889; amount paid, \$120

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- Q. That is your handwriting? A. Yes.
- Q. At the time that Mr. Hobbs came in and spoke to you? A. At the time, yes.
- Q. It was made then? A. Yes, it was at the time that Mr. Hobbs came to my office.

CROSS EXAMINED BY MR. MCPHILLIPS.

- Q. You remember being examined by me Mr. Gore, before the Registrar? A. Yes.
- Q. Speaking about this tracing that you sent to Mr. Hobbs, that I think you said¹⁰ you prepared at his request. A. In answer to his letter, yes.
- Q. That is dealing with surveys? A. Yes.
- Q. Now, I asked you this question; "Well, what do you mean by his request? Answer, That this land that I sent him on the sketch did not suit him." That is what Mr. Hobbs said, did he not? A. I did not understand your first question; I thought it meant the question; I thought it meant the sketch that I first sent him.
- Q. However, this first tracing that you sent him, the Plaintiff did say was not his²⁰ land? A. I don't remember the conversation that took place about it; but as the result of it I changed the position.
- Q. I asked you this question (reading same question and answer.) A. Yes.
- Q. He objected to it, did he not? A. That is what I understand.
- Q. And then I said, "Yes, that is this tracing that you had sent him he contended did not properly describe his land?" And you answered, "Yes, was not the land he wanted." That is what he said? A. Yes, I understood that it was not the land he wanted at that time when he was in my office.³⁰
- Q. Well, now, you thought it at that time. Well, now, I will read you the next question, "Well, didn't he say then that that was not where he built his cabin, or had done his improvements?" And this is your answer: "I cannot remember all the conversation that took place between us. But I think that was the reason." That is what he told you, wasn't it? A. I don't remember the conversation.
- Q. Now, again, I ask you if this is correct (reading same question and answer again)? Now, that is what you answered me on your examination? A. Yes.
- Q. That is still correct, is it not? A. I don't remember the conversation, as I said⁴⁰ then?
- Q. You don't remember this? A. No.
- Q. You don't remember having used this language to me? A. Oh, to you, certainly.
- Q. You remember using this language to me? A. Yes, but I don't remember the conversation that took place between Mr. Hobbs and myself.

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Q. But that is your answer, to-day the same as it was before the Registrar: "I cannot remember all the conversation that took place between us. But I think that was the reason." A. Yes.

Q. And that was what he had built his cabin and done his improvements on, the land he wanted? A. That may have been the reason; I don't remember enough about it to say that it was the reason.

Q. Now I asked you another question: "But you do not remember his saying to you that that was not his location where he built his house?" Your answer to me was "I think that that was it." A. Yes. 10

Q. Do you still think that that was it? Do you still think that? A. It may have been it; I cannot swear that; I think it may have been it; it may have been it.

Q. You told me that at that time—"I think that that was it"? A. I can only say what I know, I do not know that.

Q. Do you depart from that statement then? A. I might think it was that; but I did not know that it was that; I can only swear to what I know.

Q. "And later you sketched out the place, this particular Lot 6"? A. Yes. 20

Q. "Yes, I put his name there"; you did that? A. Yes.

Q. Then I asked you this question: "Do you remember telling him at that time, that of course the survey would define the property more clearly?" And your answer was: "No, I do not know that I did. I do not remember." Then you were asked this question "At any rate there was no dispute between you about the land? The Company had that land available?" And your answer was "Yes." Then I asked you this question: "As a matter of fact Mr Gore there had to be a good deal of latitude of description in administering the land of the Defendant Company, I mean in the locality, 30 such as there was? There is no system of block survey, or section survey, is there?" Answer, "No, there has been none carried out there." That is the fact, is it? A. Yes.

Q. Then I asked you this question: "I mean to say that in British Columbia the conditions are different than they are perhaps in the rest of Canada and the United States in that respect, is it not?" And your answer was: "Yes, the land not being surveyed before it is settled?" A. Yes.

Q. That is the fact, is it not? A. Yes.

Q. You still make those statements. Then I asked you this question: "The con- 40 sequence is that each applicant's property must be a survey in itself, is it not?" And your answer was "Very often." That is the fact, is it not? A. Yes.

Q. Now I then asked you this question: "In this particular case it is that is it not?" And your answer was, "Yes." You still adhere to that? A. Yes.

Q. You go on and say this: "Yes, but it was a rule of the office of the Defendant Company that there should be no fractional portions of land"—to that you say "Yes." Now I asked you this question, too: "I see you say here, 'The survey will have to be

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made in such a way as to leave no fractional portions of land.'" That was also a rule of the Defendant Company, was it not? A. Yes.

Q. Now, Mr. Gore, when you sent this sketch, which was Exhibit "F," you did not look upon it as being a hard and fast sketch, did you, and could not be altered, did you? A. I don't know.

Q. And neither had you had your professional opinion of it that it could not be altered? A. No, I had no reason for thinking so.

Q. Now, I refer you to your letter, which was Exhibit "E." You say (reading 10 letter). You were going as near as you could tell. That is all you did in that case in that Exhibit "F" there. That was as near as you could tell; is that not the fact? A. Yes.

Q. So that there was still latitude as to that, as to the defining of the property, was there not? A. Yes.

Q. That is, if Mr. Hobbs happened to define his land in such a way as there were irregular portions he could not have it that way? A. No.

Q. It had to be regular. Now I notice that each officer of the Company was improving as to what land the Plaintiff really wanted. You happened to give him a little 20 part of the land that he really wanted. You gave him part of Section 10. How did you happen to do that? A. I saw his original application and Mr. Trutch's receipt and I saw from that that he could not have the land that he originally applied for.

Q. Well now, just look at this? A. Because that was already covered.

Q. You said you looked at Douglas District Book, and you saw what Mr. Trutch had entered there at page 59 of that book. But I see you improve on Mr. Trutch, because Mr. Trutch had only given sections 8 and 9 you see here, this pencil memorandum of his. He did not put Mr. Hobbs in 10 at all did he? A. I don't think I put him in 10 either, 30 in that plan I sent him.

Q. Yes, I think you did (plan handed to witness). Don't you find you put him in 10? A. Oh yes I have; I did not notice that.

Q. So that you improved on Mr. Trutch; you were getting nearer Mr. Hobbs than Mr. Trutch did. Now you had the same information before you as Mr. Trutch had you not? A. Yes.

Q. You had the application, you had a copy of the receipt, the agreement of the 28th of November? A. Well, the reason I put him up, I could not put him on 8 because 40 that belonged to Anderson.

Q. That was against the Defendant Company if they had already dealt with 8? A. Yes.

Q. They dealt with 8 in Lot No. 5? A. Yes.

Q. And therefore Mr. Trutch sent him east, and you sent him north; isn't that the fact? He said he found him on the blue place, and that was on the Lumber Company's land? A. Yes.

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Q. And he sent him east and did not tell him anything about it. And you sent him north. And Mr. Hobbs said after all then to you that this did not quite define his property? A. Yes.

Q. However, you had done a little better, you had put him in 10, and you had put him in 11 as well? A. Yes.

Q. Now, as a matter of fact, Mr. Gore, his land had been found to be 10 and 11; I mean called now 6, it is in 10 and 11? A. Yes.

Q. It has been called Lot 6, has it not? A. Yes.

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Q. Well, you said there was no dispute about the land anyhow.

Mr. Pooley: I do not think Mr. Gore has said so.

Mr. McPhillips: Q. Well, did you say there was no dispute when you were dealing with the Plaintiff as to the land? There was no dispute, was there? A. Do you mean a dispute between Hobbs and myself?

Q. Hobbs and the Company about where this land was, there was no dispute, was there? A. There was no dispute, the only difference there was, was that my altering the position of it on the plan, and Mr. Hobbs came to my office

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Q. It was just a case of arriving at the truth about the whole matter, wasn't that the whole thing? You had done a good deal better than Mr. Trutch, because you had given him a part of the land he was entitled to according to his notion, on this Exhibit "F." Now in the Land Sales Book of the Company did you make any entries, do you know, Mr. Gore? There is a book called the Land Sales book here? A. No; I don't think I made any entries in that book at all.

Q. I think they are in Mr. Solly's writing; but from the records that you found—that would be in 1892, wasn't it—you found in 1892 when you wrote that letter—you found acting in your capacity as Land Commissioner of the Defendant Company, on the 6th of April, 1892—that is when you wrote this letter, which is Exhibit "E," you found there the application of the Plaintiff, did you not, Mr. Gore? A. Yes

Q. Which is now here, and which is Exhibit "B"? Did you look at that? A. I have seen it.

Q. (Handed to witness.) That is it? A. Yes

Q. You saw that, which is Exhibit "B"? A. Yes.

Q. And you saw Exhibit "C," that was the contract itself, this (handed to witness)? A. Yes, a copy of this.

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Q. You saw a copy of this. Just read it through and see if it was in the same terms? A. (Doing so). Yes, I believe it is the same.

Q. What you saw was a copy of that? A. I believe so.

Q. And you saw what other records there were in the book? A. Well, that Douglas District entry I saw.

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Q. You saw that Douglas District entry anyhow, Mr. Gore; and Bright District was a mistake? A. Yes.

Q. Having all that information before you, you sketched out this tracing, which is Exhibit "F"? A. Yes.

Q. And to the best of your ability at the moment with the information at hand, you coloured that red there as being Mr. Hobbs' land? A. Yes.

Q. Now, I asked you this question, dealing with this application, which is Exhibit "B," and the writing of the 28th of November, which is Exhibit "C:" "Well, which is the clearest? You have two writings before you, the application and the writing of the 28th of November, 1889. Which is the clearer of the two?" And your answer was: "I do not think there is very much choice." That is still your view, I suppose, of it? A. Yes.

Q. Then you were asked the question, "Are they antagonistic?" And your answer was, "Not necessarily." A. Yes.

Q. Between the application and the writing of the 28th of November, so that even you, without communicating with anyone who knew the facts, Mr. Gore—because you did not communicate with anyone with regard to what transpired at the time—you were able by the records of the Company to define Mr. Hobbs' land as defined on Exhibit "F" where it is colored red? A. Yes.

Q. That is to the best of your ability you placed him where that is colored red there? A. Yes.

Q. Now Mr. Gore, in your dealings with the Plaintiff, at least in the different matters that came under your notice with the Plaintiff, and anything that he had to do with the Defendant Company—anything coming under your administration as Land Commissioner, was all relative, was it not, to this agreement of the purchase of the 28th of November, 1889? A. You mean there was only the one transaction.

Q. It was relative to this transaction, you went back to it, did you not? A. Yes.

Q. It was relative to that? A. Certainly.

Q. Certainly, relative to that; there is no doubt about that? A. No.

Court adjourned for an hour.

At 2:15 p.m. Court met pursuant to adjournment.

LEONARD HOLLIS SOLLY, being duly sworn, testified. Examined in chief by Mr. Pooley:

Q. Your name Mr. Solly? A. Leonard Hollis Solly.

Q. What is your occupation now Mr. Solly? A. I am the Land Commissioner of the Esquimalt and Nanaimo Railway Company.

Q. How long have you been so? A. Since May 1894

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Q. How long have you been in the Land Office of the E. & N. Railway Company?
A. Since July 1887.

Q. Since July 1887. Do you know what instructions were given with reference to the sale of the Company's lands?

Mr. McPhillips: I again object my Lord; the same objection as before.

A. At what time?

Q. Since you have been in the office? A. I do; I know.

Q. Mr. Trutch was the first Commissioner? A. Yes.

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Q. And then Mr. Gore? A. Yes.

Q. And then yourself? A. Yes.

Q. What were the instructions given to sell the Company's lands? A. The instructions given were simply to sell the surface rights of the lands. In no case any minerals.

Q. Have those instructions been continued in the office until the present time? A. They have.

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Q. From the time Mr. Trutch went there to the present time? A. They have.

Q. And you have been in the office continuously? A. I have.

Q. Do you know the Plaintiff here, Mr. Hobbs? A. I have seen him.

Q. When did you first see Mr. Hobbs? A. He came to my office in the Esquimalt & Nanaimo Railway Company's offices in November, 1895.

Q. What did he come with reference to? A. To some land which he had made a payment on.

Q. What conversation had you with him? A. He came into the office and I looked at him, and I said, "What can I do for you?" And he said, "I wish to make a payment on some land in Douglas District; my name is Hobbs." I said to him: "I cannot accept any further payment on this land without further consulting Mr. James Duns-
muir." And I left Mr. Hobbs in the office.

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The Court: Q. "I cannot accept any money?" A. Any more money without consulting Mr. James Dunsmuir. I left Mr. Hobbs in my office and went into Mr. James Dunsmuir's private room, where I saw Mr. James Dunsmuir. I took with me—

Q. Never mind. When you came back, what happened? A. I told Mr. Hobbs⁴⁰ when I came back that I could not accept any further payment on this land; that the Company considered he had forfeited his right and interest in this land by not making his payments; that the full amount of the purchase money was overdue, and that statements of account asking for payment of these instalments and interest had been sent to him from time to time and that he had taken no notice of them.

Q. When you told him that the statements had been sent to him requesting payments of the money, did he make any reply to that? A. He said he had never received any.

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Q. Never received them? A. Never received any.

Q. What occurred after that? When did you see Mr. Hobbs again? A. I did not see Mr. Hobbs—

The Court: Was that all that took place then? A. Mr. Hobbs said "Well what about my \$120"? And I said to him "Well I expect that had been forfeited."

Q. Was anything further said at that time? A. I do not think so; I think Mr. Hobbs went off.

Q. What next happened in regard to it, Mr. Soily? A. I received a letter from 10 Messrs. Hunter & Duff, the solicitors, acting on behalf of Mr. Hobbs, respecting this claim of Mr. Hobbs.

Q. Did you see Mr. Hobbs after that, after receiving that letter did you see Mr. Hobbs again? A. Not after I received that letter. There was a good deal of correspondence between myself and Hunter & Duff, and it was not until that correspondence had ceased when by instructions from Mr. Dunsmuir I went to see Mr. Hobbs.

The Court: Those letters have not been put in; I should think they ought to be put in.

Mr. McPhillips: I am quite willing to put it in; but I cannot prove it strictly. 20

The Court: It is not a question of strict proof.

Mr. Pooley: I have copies of the letters received.

Mr. McPhillips: I have no objection to its going in then.

Q. Is that the letter you received from Messrs. Hunter & Duff (handed to witness)? A. That is.

The Court: You may as well put it all in as one Exhibit.

The correspondence was put in evidence, marked Exhibit No. 4 30

Mr. Pooley: Q. Did you reply to that letter? A. I did

Q. Is that the letter you sent to him—the copy? A. That is a correct copy. I have checked those copies myself.

Q. Now what induced you to write that letter that it would not be accepted? A. Because I had had several conversations with Mr. Dunsmuir.

Mr. McPhillips: Now I object my Lord; I do not know whether it will or will not be evidence, but I object if anything is going to be put in now that was not communicated 40 to the Plaintiff.

Mr. Pooley: No, I am not going to put in any conversation between him and James Dunsmuir.

Q. Had you ever had any communication with Mr. Hobbs before you wrote that letter? A. No, only the first interview in my office.

Q. Did you again write to Messrs. Hunter & Duff (letter handed witness)? A. Yes, I wrote to them on December 12, 1895 (reading letter).

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Q. In reply to that letter did you get a letter from Messrs. Hunter & Duff (letter handed witness)? A. I did, dated 23d December, 1895 (reading it).

Q. Is that another letter you received from Hunter & Duff, the 30th of January (handed to witness). A. That is 30th of January, 1896 (reading letter.)

Q. Did you write that letter to them (handed to witness)? A. And I replied to them on January 31st, 1896 (reading the letter).

The Court. Q. The next letter was a letter to the Plaintiff himself, wasn't it? A. I cannot say; I have a schedule of all these letters here if I can look at it (looking). My 10 last letter to Mr. Hobbs is No. 152.

Mr. Pooley. Q. Third of September, 1896, No. 160/96. Is that the letter you received from Hunter & Duff? A. That is the letter that I received (reading letter) that was delivered by messenger.

The Court. Q. What was the object of sending those communications to Hunter & Duff and then addressing the Plaintiff personally? A. I was instructed by Mr. Dunsmuir to see Mr. Hobbs personally and make some arrangement with him,

Q. Well when did you again see Mr. Hobbs? A. Do you mean the next time 20 after my interview with him in the office?

Q. Yes. A. At his store on Douglas Street.

Q. When? A. In the early part of 1896, February I think.

Q. When? A. In February 1896.

Q. What occurred then? A. I took a plan up to Mr. Hobbs and told him that I was instructed to see him and make some arrangement about his land, and I said to him: "You must be well aware Mr. Hobbs, that the land you applied for is not the land which is shown here on this plan," and he said Oh yes he was well aware of the fact, that he had 30 been furnished with the tracing of the land he desired.

Q. Did he say who by? A. No, he did not state.

The Court. Q. You said "Are you aware that the land you applied for—A—is not the land that is shown on this tracing"

Mr. Pooley. Q. And what did he reply? A. He replied he was well aware of the facts that he had been furnished with a tracing showing his land.

Q. Did he tell you who he had got the tracing from? A. No

Q. What else was said at that time? A. I told him if he would come down to the 40 office and talk the matter over with myself and Mr. Dunsmuir it could most likely be arranged for him to have the land which he wished to get as shown on the plan which I exhibited to him.

Q. Did Mr. Hobbs then come down to the office? A. At a future date he did.

Q. At a future date did he come down to the office? A. He did.

Q. About what date did he come down? A. I don't remember what date he came down; it must have been some little time after that.

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Q. Some little time after that? A. Some little time after that, possibly a week or ten days; I don't remember, it might have been more than that; I have nothing to fix the date on which he came down, in my mind.

Q. But you know he did come? A. I know he did come, yes.

Q. When he came do you recollect what occurred? A. Very little took place, because Mr. Dunsmuir was not in. I went in to see if Mr. Dunsmuir was in, so that I could take Mr. Hobbs to see him; and Mr. Dunsmuir was not in; and I think hardly anything took place. He went away.

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Q. Now, in his evidence yesterday, Mr. Hobbs said this: "I went down to the office and saw Mr. Solly; he showed me a plan and told me that in surveying the coal lands the surveyors had located my cabin and knew exactly my lines, and I asked Mr. Solly if he would give me a tracing of it, and he said he would do so, which he eventually did." Did that occur at that time? A. Not at that time.

Q. When did it occur, or did it ever occur? A. That occurred after I had written to Mr. Hobbs and told him that the Railway Company were prepared to give him a conveyance of this land on his having the land surveyed and paying the balance of the purchase money and interest and title fee.

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Q. Yes. After you had written that letter? A. After I had written that letter. It had not been settled at that time that Mr. Hobbs was to have the land.

The Court: Which letter is that?

Mr. Pooley: The letter telling him that he could complete his purchase

The witness: After the letter stating that he might complete his purchase?

Mr. Pooley: Q. That was the time that this conversation occurred, Mr. Solly? A. 30 Which conversation?

Q. That he states: "I went down to the office and saw Mr. Solly, he showed me a plan and told me that in surveying the coal lands the surveyors had located my cabin and knew exactly my lines; I asked Mr. Solly if he could give me a tracing of that and he said he would do so, which he eventually did." A. He did ask me to furnish a tracing to enable Mr. Priest—it was not at my second interview with Mr. Hobbs at the office.

Q. Did you state that this conversation took place after you had written that letter? A. I have not admitted the whole of that conversation yet; any conversations that took place between Mr. Hobbs and myself in regard to furnishing a tracing of his property took place after I had written to him stating that the Company were prepared to convey this property to him.

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Q. Perhaps you did not understand my question. Mr. Hobbs in his evidence yesterday stated this: "I went down to the office and saw Mr. Solly; he showed me a plan and told me that in surveying the coal lands the surveyors had located my cabin and knew exactly my lines; I asked Mr. Solly if he could give me a tracing any that he said he would do so, which he eventually did?" A. I don't remember the whole of it.

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Q. What part do you remember? A. I remember replying to Mr. Hobbs that I would furnish him with a tracing showing where his land was according to the plans which we had in the office.

Q. Then you do not recollect the conversation in which he says you showed him a plan and told him that in surveying the coal lands the surveyors had located his cabin?
A. I don't remember that.

Q. You don't remember that? A. No.

Q. You subsequently did give him a plan of the land? A. I did.

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Q. That plan is in evidence here somewhere (plan handed to witness)? A. That is the plan I furnished him with.

Q. Exhibit "I." A. Yes

Q. When did you first know that Mr. Gore had furnished him with a tracing? A. From the copy of the letter—from reading the copy of Mr. Gore's letter to Mr. Hobbs in which he states that he encloses a tracing.

Q. When did you first see the tracing? A. In Mr. McPhillips' office after the first examination—after Mr. Trutch's examination I saw it.

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Q. After Mr. Trutch's examination? A. Yes

Q. In this action? A. No, I do not think it was after Mr. Trutch's examination, I think it was after your examination of Mr. Hobbs. However, it was at the commencement of this case; I called at Mr. McPhillips' office in the evening; he was not there, but somebody showed me the tracing.

Mr. McPhillips: Q. That was Mr. Anderson? A. I think so; however I saw it in your office.

Mr. Pooley: Q. Have you seen this plan? A. I have.

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Q. Have you seen the receipt given by Mr. Trutch on the 28th of November, 1889?
A. I have.

Q. According to the statements in that receipt, where would you locate the land there described? A. From the receipt?

Q. From the receipt given by Mr. Trutch? A. It would be over here (indicating on Exhibit "Z").

Q. I am now referring to Exhibit "C"—"Commencing at a point about two miles west of Louis Stark's Crown Grant" (reading the description). Now, where would you locate this land, Mr. Soily, on that plan from this description? A. If I assumed that the north-west corner post of Stark's Crown Grant was the starting point then the position of the land as coloured here blue would be correct.

The Court: It would be the land colored blue on Exhibit "Z"? A. Yes.

Mr. Pooley: Q. Can you show me on that map, where is the land that was conveyed in the deed? A. That colored yellow.

Q. That coloured yellow; you are aware of that fact? A. I am, yes.

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Q. That is the same land as mentioned in Exhibit "T" (handed to witness?) A. Yes.

The Court: Q. The land in the Crown Grant is marked yellowish on the plan "Z?" A. Yes.

Q. What is the land there colored brown? A. I believe it corresponds with the land shown on the tracing furnished by Mr. Gore.

CROSS-EXAMINED BY MR. MCPHILLIPS.

Q. Now you speak of a time Mr. Solly when Mr. Hobbs came down to your office. 10 That was at your request wasn't it? A. The second interview yes; I asked him to come down.

Q. So that the time you went to see Mr. Dunsmuir the second, or the first? A. I went to try and find Mr. Dunsmuir on the second time that he came down, Mr. Dunsmuir was not in. The first time he was in I saw him at once.

Q. Will you tell me what time that was of the year? It was in November, 1895

Q. That was the 1st of November. A. Yes.

Q. And Mr. Hobbs stated in his evidence that he handed you this agreement of the 20 28th November, 1889, that is Exhibit "C," and you took it with you to Mr. Dunsmuir's; did you do so on that occasion? A. I did not.

Q. You did not? A. I did not.

Q. Was it on the second occasion you did then? A. On neither.

Q. On neither? A. On neither occasion was the receipt produced.

Q. Well now, you did produce a copy of this receipt to Mr. Dunsmuir at that time, 30 did you not? A. No.

Q. You did have a copy of this receipt, Exhibit "C," in the office? A. Certainly.

Q. Amongst records of the office you had that application, too, which is Exhibit "B"? A. In the office, yes.

Q. What was Mr. Dunsmuir's occupation at that time? He was a Director and Vice President of the Company; is that it? A. He was.

Q. He was actually the Managing Director, or Acting Manager? A. He was Vice 40 President.

Q. I mean acting as such; he was the Executive Officer of the Directors? A. I presume so, in the absence of the President

Q. Didn't you go into the matter of this receipt of the 28th of November, 1889, and this application? A. Who with?

Q. With Mr. Dunsmuir? A. Oh, yes, not at that date.

Q. Not at that date? A. No.

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Q. When was it you did, if you remember? A. Some little time after coal was discovered in Douglas District, Mr. Dunsmuir sent for me and asked me to produce the plans showing what lands had been sold or pre-empted in that neighbourhood.

Q. In the neighbourhood of where coal had been discovered? A. Coal had been discovered in Douglas District, what is called the E. & N. Extension.

Q. What did you do at that time? A. And to find out what land had been conveyed by the Company, and what sales had been made which were uncompleted. I produced the plans and gave him the information he required

Q. That is the application, and this writing—that is Exhibits "B" and "C" came under Mr. Dunsmuir's notice then? A. No, they may not have. ¹⁰

Q. But you gave him the information? A. I gave him the information from the plans; I gave him the plans and I turned up the Sales Book. Although I previously knew that this sale of Mr. Hobbs had not been completed, that his instalments were behind.

Q. Would you just turn up to where the entry is in re Hobbs' application in that book called the Sales Book? (Witness does so.) You find it at page 95? A. Page 95. ²⁰

Q. Read the printed matter as well as the writing. A. Bright District; Number of lot, Lot 6; date of purchase, 28th November, 1889; name, Frank Vicker Hobbs; how acquired, purchased; acreage, 160 acres; price, \$3.00 per acre; terms of payment and dates when due, 1st payment, date when paid, 28th November, 1889; certificate of payment number, none; amount paid, \$120; remarks, balance—

Q. There is the total. A. Total, there is no total. That is the balance—the total would be extended in ink when the purchase was closed; that is simply the balance. The conveyance of title, number and date, none; remarks, balance in three yearly payments of \$120, interest at 6 per cent. ³⁰

Q. That was what was entered there? A. Yes.

Q. Is that in your hand writing? A. It is.

Q. When was it entered? A. Probably the next day or within a day or two after the receipt was given by Mr. Trutch.

Q. That would be within a day or two of the 28th of November, 1889? A. Yes.

Q. Looking at that same page, 95, what do you find has been done; something has been done with part of that writing that you have been reading? A. There is a note in red ink—memorandum in red, "transferred to Douglas District. folio 87." ⁴⁰

Q. Do you remember when you wrote that in? A. I do not.

Q. Can you say when? A. When my attention was called to the fact that this land was not really in Bright District, but in Douglas District.

Q. Looking at your entry here, you can acknowledge it, simply looking at the previous entry, I think you told me before? A. It must have been after the end of 1891.

Q. It was somewhere after the end of 1891? A. I cannot say what date.

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Q. It had to be anterior to 1894 anyway? A. Yes.

Q. The next entry is 1894? A. Yes.

Q. It had to be between 1891 and 1894? A. Between the end of 1891 and 1894.

Q. Now I ask you to read the printed matter on the top here the same way. Headed what? A. Douglas and Dunsmuir District. Dunsmuir is in writing, because on this page is an entry of one Lot sold in Dunsmuir District, and there is no place in this book with a printed heading of Dunsmuir District. Number of Lot, Lot 6; date of purchase 28th November, 1889; name, Frank Vicker Hobbs; how acquired; purchase; acreage 160¹⁰ acres, price per acre, \$3.00.

The Court: Q. That is the Douglas District? A. Lot 6, Douglas District, transferred from the previous folio. Terms of payment and dates when due, 1st payment, date when paid, 28th November, 1889. certificate of purchase. No none; amount paid \$120. The total comes below; I will read that when I come to it. Total, none. The second entry; balance, date when paid 29th April, 1895; certificate of payment No. 864; amount paid, \$360, 6 year's interest; the same date and same certificate of purchase, \$126.60; title fee, same date and same certificate of payment, \$10; total \$619.60; conveyance of title,²⁰ number and date, number 302, date 1st May, 1896.

Mr. McPhillips: Q. And under "Remarks" there is—balance in three yearly payments of \$120, and interest at 6 per cent? A. Which was transferred from the other folio.

Q. That was made when you discovered that the property was really in Douglas District? A. That entry is, yes.

Q. And you wrote it there, as you have it, Lot 6, Douglas District? A. I did, because that was the next vacant lot number. It was curious that it happened to be the same number that it had in Bright District; that is merely a coincidence; it might have³⁰ been 9 or 10; it just happened to be the same number in Douglas District that it had been in Bright District.

Q. The conveyance that has been executed by the Company, is of Lot 6, Douglas District, is it not? A. It is.

Q. And consistent with this entry here, page 87? A. Yes.

Q. And you say this entry must have been after 1891, and certainly long before 1894? A. I do not say necessarily long before that; it must have been between those⁴⁰ two dates.

Q. Between the end of 1891 and the early part of 1894? A. Yes, between those two dates.

Q. Are there any other entries relative to the Plaintiff's purchase in this Land Sales Book? A. None.

Q. We have referred to all? A. We have. Except in the index, you will find his name in the index.

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Q. Now this application and this receipt—this agreement of the 28th of November, 1889, there, Exhibits "B" and "C," they were always, I understand it, in the office of the Defendant Company? A. No, a copy of that receipt was.

Q. Yes, a copy of that receipt was. That is the application, the Exhibit "B," and a copy of Exhibit "C," remained in the office of the Defendant Company? A. They did.

Q. From the time Mr. Hobbs first took away his original? A. They did.

Q. I think you knew where they always were? A. Yes. 10

Q. And they were of the records of the Defendant Company? A. They were.

Q. And when you saw Mr. Dunsmuir you were thoroughly conversant with the fact, I suppose, attendant on this purchase? A. Which interview?

Q. That first interview which you had with him—no, that interview when the coal had been found? A. Not the first interview.

Q. Well, when the coal had been found you were then prepared to go over all the matter with Mr. Dunsmuir, were you not? Did not Mr. Dunsmuir send for you, as you say? A. He did. 20

Q. And he wanted to go into the whole question? A. He wanted me to show the map and show what properties—

Q. Did you show him the plans? A. Yes.

Q. Which plans? A. Two plans, Cranberry District and Douglas District.

Q. Are they here? A. Yes. This is the plan, I think, that was looked at first, and he wanted to see a plan which showed the land to the west. This is a copy of the official plan of Cranberry District—Cranberry District Official Map, 1891.

Q. That is Exhibit No. 1? A. Yes. A great deal of additions have been made to this. 30

Q. You brought them to Mr. Dunsmuir? A. Yes; and he said he wanted to see a plan to the west of this, that is of Douglas District, and I showed him this.

Q. Had it the Plaintiff's land described on it? A. This has not.

Q. Was it then? A. It was then.

Q. And you found Lot 6 there? A. Not like this at the time I showed it; it was pencil only. 40

Q. And it has now been put in ink? A. There was also here in pencil F. V. Hobbs' land to the south of this.

Q. But this particular Lot 6, was that accredited to Mr. Hobbs at that time? A. His name was on it, too, in pencil.

Q. That is, Mr. Hobbs' name was on Lot 6 as now conveyed to him? A. The topographical was not on, it was just simply put in in a square.

Q. Where it now is? A. Where it now is, in that position.

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Q. Mr. Dunsmuir was not in any doubt as to where Mr. Hobbs' land was at that time? A. Oh no, I showed him that that land was the land which had stood in Mr. Hobbs' name.

Q. Yes, Lot 6. Now Mr. Solly, you told my learned friend that if this was carried out—the survey of Mr. Hobbs' land was carried out in accordance with your assumption of what the writing of the 28th of November meant, that it would come on this Plan "Z," where the blue lines are done? A. I stated that if this point of Stark's Crown Grant was taken as the starting point it would come here (indicating).

Q. Yes; suppose, if on the other hand, the assumption was that the starting point might be, say a little northwest, you could then define this Lot 6 as it is defined here, with the southern boundary parallel with the north boundary of Stark's Crown Grant? Would not that be fact? A. If it stated northwest.

Q. If the direction was a little north of west? A. It would throw it up a little north of west, if you assumed that as the starting point.

Q. Yes as a matter of fact, as the survey is now made the southern boundary of the land of the Plaintiff, that is, Lot 6 is upon a line drawn due west from across the northern boundary of Stark's Crown Grant? A. It is.

Q. The fact of the matter is that instead of being drawn south it is drawn north? A. Entirely north.

Q. And that is the only variation there is about it. A. Oh yes, it is not so far off.

Q. But even Mr. Trutch you know put him closer at the first. A. You asked me if that is correct in my with that supposition, and I say, no it is not.

Q. It is a little nearer undoubtedly? It is a little nearer. Now as a matter of fact when you saw Mr. Dunsmuir at that time when the coal had been discovered, the Company were aware where Mr. Hobbs' cabin had been erected? The Company had become aware? A. Not at that time.

Q. I thought they had? A. They might have, I don't know; I was not conversant with it then, at my first interview with Mr. Dunsmuir.

Q. No I mean that interview in 1895, when you found the coal—when Mr. Dunsmuir was aware that there was coal there, he asked for you did he not? A. Yes.

Q. And you went into the matter? A. I did.

Q. Didn't you tell me this—I am now referring to page 65 of your examination evidence, line 18: "Did you know that he had gone on his land at all after he had made the purchase? (A.) I cannot say that I did. The position of that cabin was only established from some surveys that were made up there by Mr. Pinder in connection with the coal discoveries" A. That is true.

Q. "When would that be about? (A.) That must have been, I think, in the summer of 1895." Therefore, Mr. Dunsmuir became aware, did he not, that there was coal

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up there—definitely aware, from these surveys of Mr. Pinder, did he not? A. I don't think so; I think the coal was discovered by somebody else.

Q. But after the coal was discovered, now, as a matter of fact, Mr. Solly, the Company took some steps to get the property defined around there? A. I believe so.

Q. Yes they did. As a matter of fact, Mr. Pinder was the gentleman who did it? A. He was.

Q. And when he was doing that work the Plaintiff's cabin was definitely established? A. I don't think the position of it was established then. Mr. Pinder, I think, ¹⁰ stayed in the cabin. But I think the lines that he ran that finally established the position of Mr. Hobbs' cabin had not been run at that time. He stayed in a hut which was known as Hobbs' cabin, he and his survey party, I understood from him, but I do not think he had ascertained the exact position of Mr. Hobbs' cabin, so that I could place it on this plan or any plan until some time after that.

Q. He came across a cabin? A. He came across a cabin, which he stayed in.

Q. I see you carry out cabin on all these plans? A. I got the position of that cabin from Mr. Pinder.

Q. For instance, on this one you have Lot 6 and then you have "cabin"? A. ²⁰ Yes.

Q. And on that one there you have Lot 6 and "cabin" on this one also? A. I cannot say on what date Mr. Pinder established the exact position of that cabin.

Q. It would be in 1895? A. If he had made his surveys in 1895 I presume it would be 1895.

Q. You say in your examination that must have been in the summer of 1895; you have no reason to depart from that now? That is the way you recollected it on your examination? A. I am not sure about that; in all probability it was the summer of 1895, ³⁰ but I am not positive of the fact.

The Court: Q. You say, Mr. Solly, that some little time after coal was discovered in Douglas District Mr. Dunsmuir told you to report what land had been conveyed, and what sales remained uncompleted. When was this discovery of coal in Douglas District? A. I cannot say.

Witness stands aside.

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JAMES DUNSMUIR, being duly sworn, testified. Examined in Chief by Mr. Pooley:

Q. Your name Mr. Dunsmuir? A. James Dunsmuir.

Q. What is your position in connection with the E. & N. Railway Company? A. Vice-president.

Q. Have you been vice-president of the Company since its commencement? A. No.

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Q. When were you appointed Vice President, do you know? A. I couldn't exactly say the date.

Q. You were Vice President in 1889, were you not? A. The books would show it.

Q. Were you one of the Directors of the Company? A. I was.

Q. Have you been so since its commencement? A. Yes.

Q. Do you know the instructions that were given with reference to the sale of the Company's lands? A. Yes.

Q. What were they? 10

Mr. McPhillips: I make the objection again, unless it can be connected with the Plaintiff in some way.

The Witness: I gave the instructions to the Land Commissioner, Mr. Trutch, that he was to sell the land and reserve all minerals.

Q. And reserve all minerals? A. Yes.

Q. Have any minerals ever been sold? A. Yes.

Q. By your Commissioners? A. No, not by the Commissioners. 20

Q. Have minerals ever been sold by the Company—coal? A. Yes, coal.

Q. Coal has been sold by the Company. Do you know when that was. Mr. Duns-
muir? A. By resolution passed by—at a General Meeting of the Railway

The Court: Q. Passed by who? A. At a General Meeting of the Railway.

Mr. Pooley: Q. You mean I suppose, of the shareholders of the Company? A
Yes the shareholders.

The Court: Q. Coal land has been sold? A. Coal land has been sold—not the
coal land—coal. We did not sell the land. The mineral was taken up in that case, but
not the land. 30

Q. You mean coal rights? A. Coal rights, yes.

Mr. Pooley: Q. When was the E. & N. Railway Company formed, do you know,
what year, Mr. Dunsmuir? A. 1883, I think.

Q. What interest have Dunsmuir's in the Railway Company? A. One half.

Q. Prior to the passage of the Railway Bill—called the Railway Bill—had you any
coal interests in the province? A. Yes. 40

Q. Had you any coal lands? A. Coal lands, yes.

Q. Were you carrying on the business then of coal miners? A. Yes.

Q. And were carrying on Collieries. Had the fact of your carrying on collieries in
this Province anything to do with taking up the Island Railway? A. That is the reason
my father took it up.

Q. That is the reason he took it up.

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The Court: It was to further his interest in the coal mines. A. To protect his coal interests.

Mr. Pooley: To protect his own collieries. And except in the one instance that you have mentioned, Mr. Dunsmuir, no coal lands have ever been sold? A. Never, no.

Q. And who were they sold to? A. To my father.

Q. The only coal lands sold by the E. & N. Railway Company were sold by the E. & N. Railway Company to whom? A. To my father. Sold by the E. & N. Railway Company by resolution passed by the Board. 10

Q. What price was paid for that land by your father? A. One hundred dollars an acre.

Q. Your father paid for it \$100 an acre, and that was not for the surface, but for the coal right? A. That was for the coal right.

Q. Mr. Hobbs stated yesterday in his evidence that he went to the slope which you were working near his land in January last and went down the slope 150 yards about, is that so? A. No, I think it was only 50 yards down about, at that time.

Q. Only 50 yards down at that time? A. Yes, he could not have gone very far²⁰ because he had a piece of paper to go down to the mine where they mined, so that he could not go very far; he only had a piece of paper, he did not have a lamp. He was forbidden to go down; that was through instructions to the men in charge not to allow anyone to go down.

Q. But you say at that time the slope was only about 50 yards? A. About 50 yards. He might have meant 150 feet. He said 150 yards.

CROSS-EXAMINED BY MR. MCPHILLIPS:

Q. You are now the Vice-President of the E. & N. Railway Company? A. I am. 30

Q. In November, 1889, what was your position? A. 1889, Vice-President

Q. Well, now, in November, 1889, the office of Land Commissioner for the Defendant Company, the E. & N. Railway Company, was filled by Mr. John Trutch. A. Yes.

Q. Who was called here as a witness? A. Yes.

Q. Now, you have told my learned friend that your instructions, and I think the instructions were given by you— A. Given by me to Mr. Trutch.

Q. You say your instructions were to him that he was only to sell the surface, not⁴⁰ the minerals? A. Not the minerals; sell the land, but not the minerals.

Q. Sell the land, but not the minerals? A. Yes.

Q. But these instructions were verbal, were they not? A. Verbal, yes.

Q. And you did not have those instructions formulated in any way and printed and posted up in the office, or anything of that kind? A. Not necessary; no.

Q. You did not deem it necessary? A. No.

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Q. Neither did you have your solicitor prepare any form of agreement of sale which would be given the purchasers as they came and enquired and got land? A. No, not at all. That was all done by the Land Commissioner.

Q. You relied on the Land Commissioner? A. Yes.

Q. That is, you relied on the Land Commissioner? A. On the Land Commissioner, yes.

Q. You had no settled form of agreement for sale, and did not provide the Land Commissioner with one? A. No, the Land Commissioner had his instructions to sell the land, or the surface right and not the minerals.

Q. Yes; and then again there was no form of agreement for sale settled, that he was to use for the Company? A. No, it was not necessary to have a form because he was instructed to sell the land.

The Court: You know, Mr. Dunsmuir, that is really the point we are trying to decide in this case whether it was necessary or not. Of course that is your opinion, but that is what we are trying to find out in this case.

Mr. McPhillips: Q. There was not as a fact any regular form of agreement for sale to be given to purchasers when they applied for land? A. No, we did not think it necessary to do so.

Q. In fact you left that whole matter with the Land Commissioner? A. Yes.

Q. As to the form? A. As to the form.

Q. Because you have already stated what you instructed him; but you left him to settle any form or any receipt? A. No, not any form; we left him to give a receipt, but only if he paid the full amount of his land, then he received our deed.

Q. Yes, you gave a deed? A. We gave a deed, not drawn up by the Land Commissioner, but drawn up by our solicitor.

Q. Yes, I am not quite that far on yet. Then, I understand you, the Land Commissioner was to deal with the purchasers; but you say his instructions were verbal? A. Yes.

Q. Only to sell the surface of the lands and not the minerals? A. And not the minerals.

Q. And you rely on the Land Commissioner, that is Mr. John Trutch, in this case, notifying each purchaser of those terms? A. Yes.

Q. You did not publish any advertisement, say in the press of the time, that is, of the 28th of November, 1889, say and round about that time, of any limitation on the power of your Land Commissioner? A. No; we did not think that necessary.

Q. You did not think that necessary? A. As everybody knew that.

Q. You assumed Mr. Dunsmuir, that people did know that? A. Yes.

Q. I think you heard read here, did you not, an advertisement which did appear in 1887, I think it was, over the signature of your father, Robert Dunsmuir? A. Yes.

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And the same gentleman, Mr. Trutch, dealing with lands that were sold under the Land Act? A. Yes

Q. That notice was signed, Robert Dunsmuir, President and John Trutch, Land Commissioner, was it not? A. Yes.

Q. That is the only advertisement you remember of, where there was any public notice given of dealings with lands, is it? A. I think so; I think that is the only one.

Q. That is the same Mr. John Trutch then who was exercising his office on the 28th of November, 1889, who was published as being the Land Commissioner at that time, that was the same man? A. The same man, yes. 10

Q. Same man as the John Trutch whose name appeared in that advertisement in 1887? A. Yes.

Q. Now, I think, Mr. Dunsmuir, that the E. & N. Railway Company differs from some other Railway Companies in that it has two departments, a Railway Department and a Land Department? The E. & N. Railway Company have a large land grant, have they not? A. Yes, they have a large land grant

Q. And they had that from the start or inception of things from the time of incorporation? A. Well, in a way it is all in one, we call it the E. & N. Railway Department, but it is all one Company. 20

Q. Oh yes, certainly, but as a matter of fact when the E. & N. Railway Company as a Company undertook to build the Railway, one part of the consideration was a land grant, was it not? A. Yes, a grant of land containing all the minerals.

Q. Yes, there is no contest about that. And you eventually by letters patent of the 21st of April, 1887, you did get letters patent from the Dominion Government—the E. & N. Railway Company did get letters patent from the Dominion Government granting the lands set forth in the Statute, did they not? A. Yes. 30

Q. And those letters patent speak for themselves, but as a matter of fact speaking generally you got everything that was in the land, at least you got the whole title, in fact you thought at one time you thought you had the gold and silver, did you not? A. Yes, and think so yet.

Q. However, the Privy Council have determined that that remained in the Crown. At any rate you have the coal, there is no question about that? A. We have everything, yes.

Q. And it was in 1889, in November, as it is to-day, within your power to sell everything other than gold and silver? Is that not a fact, if you so choose? A. Within whose power? 40

Q. It would be within the power of the Company to sell? A. Yes, within the power of the Company.

Q. Yes, to sell if they so chose. Now you say there was as a matter of fact, although it is the same institution of course—there is a railway department and there is a land department? A. Yes

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Q. And the administrator of the Land Department on the 28th of November, 1889, was Mr. John Trutch? A. Mr. John Trutch.

Q. And styled Land Commissioner? A. Yes.

Q. He was held out as Land Commissioner; I mean he was on the letter paper, and you have an imprint? A. Yes, he was Land Commissioner.

Q. Yes, undoubtedly, he was Land Commissioner. Now in all your dealings with this application of the Plaintiff—because it came eventually before your notice—you assumed throughout, Mr. Dunsmuir, that only the surface had been sold. Is not that a fact? 10
A. Yes, that is a fact. It only sold the surface. That is we term it land in our office, we do not say surface rights, we say land.

Q. Land, but minus the minerals? A. Yes, minus the minerals.

Q. And even to-day notwithstanding this agreement of the 28th of November, 1889, which is Exhibit "C," you contend still, do you not, that only the land, not the minerals was sold? A. Only the land, not the minerals.

Q. Yes, this purchase of Mr. Hobbs' the Plaintiff came under your notice. When do you think first? A. I think it was when we discovered coal out there? 20

Q. That would be when? A. 1895, in August

The Court: Q. Mr. Hobbs first came under your notice when? A. In 1895 when we discovered coal.

Mr. McPhillips: Q. When Mr. Solly was in the box I referred him to page 87, or he referred to page 87; called Dunsmuir and Douglas District, headed, and this is the Land Sales Book, and is one of the books of the Company? A. One of the books of the Company.

Q. And in the office of the Company? A. And in the office of the Company, 30 yes.

Q. That was in the Land Commissioner's Department, of course? A. Yes.

Q. You don't remember looking at that yourself? A. No, I don't think so.

Q. Was it the practice of the Board of Directors to have that book brought before them. A. No.

Q. At any time? A. No.

Q. Never was? A. No.

Q. That was a part of the Land Commissioner's department business. You knew 40 as a matter of fact, Mr. Dunsmuir, as all the other Directors knew it did, naturally you knew that a certain amount of land sales had been made? A. Yes, we had a report.

Q. You had a report, but you don't remember whether those reports were in detail indicating the names and the amount of— A. No, they were not.

Q. Or the extent? A. Just the total sums.

Q. Or the extent of the interests conveyed? A. Just the number of acres conveyed.



Q. You merely had reported to you the number of acres sold, and the purchase money? A. Yes.

Q. And the amount of money received? A. Yes.

Q. But did you have that naturally? A. We had that, yes.

Q. Now, when you found that there was coal upon the land of the Plaintiff, or what he claims to be his land, did you go into the matter of Mr. Hobbs' purchase particularly? A. No, not particularly; when we found the coal I wanted to see who had taken land up out there in that locality. So I told Mr. Solly to bring the plan in to see. 10

Q. Yes, and Mr. Solly then did do that and went into the matter with you? A. Went into the matter.

Q. And then it came to your notice that the Plaintiff claimed this Lot 6 in Douglas District? A. No, not then.

Q. Not then. A. No.

Q. Would not his purchase be— A. I wanted to see for my own information, you see, where this coal was on the plan.

Q. Oh, I see, you wanted to see for your own information first? A. I knew we²⁰ had the coal, you see, and I wanted to see who had land there.

Q. I see; and what did you find, Mr. Dunsmuir? A. I don't think I remember anything about Mr. Hobbs at that time.

Q. You don't remember anything about Mr. Hobbs? A. No, not at first when I called for the plans.

The Court: Q. What, do I understand you? When you discovered coal you looked into the question of who had recorded land there? A. Yes.

Q. You don't recollect meeting Mr. Hobbs' name. You say you enquired yourself;³⁰ what do you mean by enquiring? A. I wanted to find out from the plan who had taken land up in the locality that we had found coal in.

Q. And you went to your books for that purpose? A. No, I asked Mr. Solly for the plan; I could take it from the plans.

Mr. McPhillips: Q. Do you remember what plan it was? A. I think it was that plan (indicating).

Q. That is Exhibit No. 1? A. That is, I knew the plan and I knew that coal was around in this locality, somewhere, do you see. 40

Q. West of Stark's property? A. I knew it was near Stark's property, or Stark's Lake.

Q. I see on this plan, Exhibit No. 1, there is a pencil mark, Lot 6, Douglas District, with the name of F. V. Hobbs on it and a cabin? A. I don't think that was marked there at that time, I don't think it was, I don't remember.

Q. Who did you find had property there? A. I found the party whose name was on the plan.



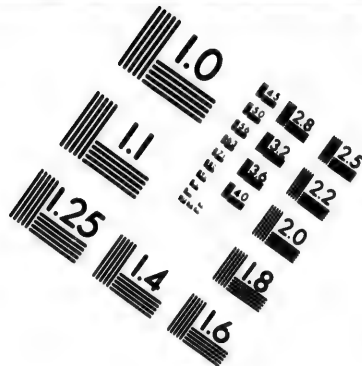
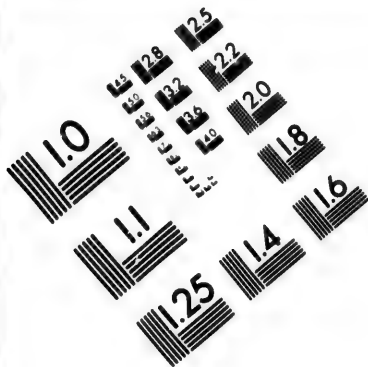
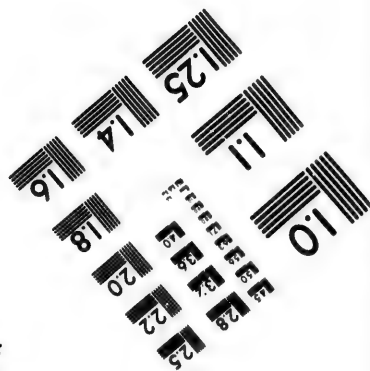
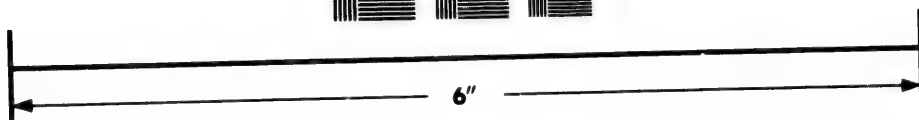
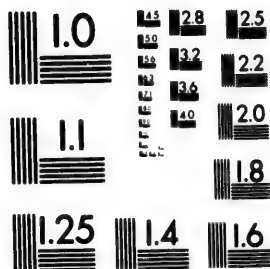


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Q. And the plan you consulted was Exhibit No. 1? A. Yes, that was the one, I think; this was one and there is another one yet.

Q. Was it this one, Mr. Dunsmuir? A. No. This was the one here (the same one).

Q. Dealing with that one, that would not show it unless it had the pencil sketch on it. Do you think that was there at the time? A. I could not say; I forget about that. But I knew these names here; I knew what land had been taken up

Q. But it is quite likely that Mr. Hobbs' was sketched on there in pencil and this 10 man J. Sharon, and so on? A. They might have been there; I never thought about it.

Q. At any rate your idea was to find out who the people were? A. Who the people were.

Q. That had land in that vicinity? A. Yes.

Q. And then you found out eventually that Mr. Hobbs had? A. Yes.

Q. At that time? A. Probably at that time, I could not say, I did not take much notice of the surface rights at that time. 20

Q. But of course you still assumed that there would be no question of coal with those people? A. Of course I did. I knew they did not have the coal. As far as the minerals are concerned, it did not bother me; I only wanted to see who had the land there.

Q. You had got advice then that Hobbs claimed Lots 6? A. Yes.

The Court: Q. The same as the rest had. You did not attach importance to Mr. Hobbs name of record as you said he had only surface rights the same as the others had? A. The same as the others had certainly, that is correct. 30

Mr. McPhillips: Q. When the Land Commissioner made the sales, such as the one to the Plaintiff, the sale to the Plaintiff was a sale by the Company, not a pre-emption? A. No, a sale by the Company; \$3.00 an acre.

Q. As a matter of fact the pre-emptors were entitled to land at \$1.25, if they filed under the Act proper? A. If it was taken up within the limits, yes.

Q. But this land was sold and the price was \$3.00 an acre? A. \$3.00 an acre.

Q. The purchasers were at perfect liberty to go into the possession of the land, were 40 they not, when it was agreed to be sold to them? A. Yes.

Q. And the Plaintiff was perfectly entitled to go upon the land on the 28th of November, 1889, after he had paid his \$120.00. A. Yes.

Q. He did as a matter of fact go on the land and build a cabin? A. He went on the land, yes.

Q. And built a cabin? A. I don't think that it was the land that he applied for according to the receipt, or the application.

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Q. You think that the land that he built his house on and the land that he actually wanted was not very accurately described in the receipt? A. No.

Q. Now when did the matter first strike you—when did it first strike you that the Plaintiff would claim the coal under the land? A. It never did strike me.

Q. It never did strike you? A. No.

The Court: Q. It struck you when he claimed it, didn't it? A. It struck me when he claimed it, yes. I did not see how he could claim it.

Mr. McPhillips: Q. When did it first make an impression on your mind? When did it first come to your notice? A. When it first came to my notice, well, I forget that part of it; I could not say when it first came to my notice.

Q. Well, there was one time, Mr. Dunsmuir, when your contention was that the agreement of sale had lapsed, was there not? A. Yes.

Q. That was your first objection, anyhow? A. Yes; when Mr. Solly came in to me and told me that Mr. Hobbs wanted to purchase the land that he applied for, I told Mr. Solly that we would cancel it; that he had not made his payments in accordance with the agreement.

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Q. When was that Mr. Dunsmuir? A. That was after we had—

Q. Discovered the coal? A. Discovered the coal.

Q. That would be in 1895? A. 1895, yes.

Q. I think that was in the spring; but do you remember whether it was spring, summer or fall? A. No, I think it was in August.

Q. You think it was in August? A. Yes.

Q. In August, 1895, your first position taken was that the agreement had lapsed by default in making payments? A. The agreement had lapsed.

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Q. That he had forfeited it, is that it? Mr. Solly says that? A. Yes, but then there are lots of ways of looking at it.

Q. He says, anyhow, that he came out and had instructions to tell Mr. Hobbs? A. He had taken that land up and he had been notified to make up the payments; he never took any notice whatever of the notifications. Therefore we thought that he had given up the land. When he heard that we had found, or that there had been coal struck or found out there, then he comes to make a claim on the land.

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Q. Well, we have had his statement, you know, that he thought he was only paying six per cent. interest to you and his money was worth more than that to him? A. Well, I told Mr. Solly, no, we will cancel it, as he has never made his payments.

Q. You cancelled the agreement? A. I cancelled the agreement. After thinking it over I did not want to take advantage of him, I told Mr. Solly that we would pay the \$120 back. He was not satisfied with that. So then I told Mr. Solly—I said let him have it, Mr. Solly, because he has only got the surface rights, and anything we want to have, the

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use of the land to go on there and prospect for coal, we have the right to do that under our deed—the deed that we issue.

Q. And that is the whole thing? A. That is the whole thing.

Q. At that time, Mr. Dunsmuir, you knew the contents of this receipt, as you call it of the 28th of November, 1889? A. This receipt, of course.

Q. I mean to say you knew it. Because this writing of the 28th of November, 1889, which we call the agreement which is Exhibit "C"? A. Yes.

Q. That is the only writing that we know of that sets forth when the payments are ¹⁰ to be made? A. Yes.

Q. For instance it says the 1st payment is \$120; and that is paid? A. Yes.

Q. It says the balance of the purchase money to be paid in three equal instalments? A. Yes, bearing interest.

Q. The instalments bearing interest at the rate of 6 per cent? A. He never paid his interest, and never paid any of the instalments.

Q. Yes, that is quite true. you then knew the agreement of the Land Commissioner with the Plaintiff, you knew the terms? A. No, I never saw that receipt. ²⁰

Q. You never saw that receipt? A. No.

Q. There was a copy in the office? A. Yes.

Q. How did you know the terms of payment? A. I knew that all the time.

Q. How did you become aware of that? A. That was the terms of payment that we had with all people that had taken up land, settlers taking up land, those were the general terms of payment.

Q. Those were the general terms of payment? A. Those were the general terms ³⁰ of payments.

Q. How would you become aware of the nature of the contract with the Plaintiff and the exact dates of payment? Because you see it says in equal instalments at the expiration of one, two and three years, and as it happened, the Plaintiff came into your office on the 28th of November, 1889? A. Yes.

Q. Of course, another purchaser might come along next day, and so on, and the days of payment would be different? A. The days different? No.

Q. The dates would be different? A. The dates would be different, but not the ⁴⁰ dates that would be one, two and three years. There would be so much paid down, and the balance in one, two and three years. I knew that the Land Commissioner knew that.

Q. And before you could say a person had been in default of his agreement, you would have to know the terms of it? A. Know the terms.

Q. Wouldn't they have to? Wouldn't you have to know the terms of an agreement before you could say a man was in default? A. Mr. Solly came into the office and told me the terms of agreement, of course. But I never saw that particular agreement.

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Q. You relied on Mr. Solly to tell you the terms of the agreement? A. I knew the terms of the agreement; in every one those were the terms, so much down and the balance in so and so. I knew the terms.

Q. As a matter of fact, you were contending that the Plaintiff lost his right to this agreement because of default in making payments, was not that it? A. Yes, Mr. Solly and I talked it over when he came in.

Q. And to bring your mind intelligently to the particular thing—to know when he was to make the payments? A. Yes, Mr. Solly came in and told me that Mr. Hobbs was in his room, had come to make the payment on his property; I told him no, we would cancel it, that is when he went on—Mr. Solly had said that the terms were 1, 2 and 3 years; we talked that over and knew exactly what it was. 10

Q. Did he tell you the date of the agreement? A. I don't know.

Q. One, two and three years, may be? A. I knew that he had taken it up in November, 1889.

Q. You knew that he had taken it up in November, 1889? A. Yes, I knew he had taken it up at that time. 20

Q. How did you happen to know that, Mr. Dunsmuir? A. Well, in looking over it, and asking Mr. Solly, and consulting with the Land Commissioner.

Q. Consulting with the Land Commissioner, you knew that? A. Yes

Q. I think, Mr. Dunsmuir, you have been the active director of the Company, have you not, all the time? A. Yes, all the time

Q. The fact of the matter is— A. Everything comes before my notice, any matter, whether it is land, or whatever it is. 30

Q. As a matter of fact, then, there is not a quorum of Directors in the Province of British Columbia? A. At times they are here.

Q. At times they are here. But sales of land have to go on from time to time? A. Sales of land, yes; because that is an understood thing how we deal with lands.

Q. Then you gleaned your notion of the agreement lapsing from information from Mr. Solly? A. You see, I know all these things. They will come in to me and say so and so applied for such and such land in such and such district, can I let them have it? And they bring a plan and I will say "yes" or I will say "no." That is the reason I know it. It all comes before my notice. 40

Q. It all comes before your notice. And that is, of course, that this deal with the Plaintiff is no new matter to you; it was not a new matter, you were conversant with it? A. Yes.

Q. You never made a practice, Mr. Dunsmuir, in the administration of the lands of the Company, to have a surveyor in the field to check up the different locations made by settlers, or anything of that kind? A. No, never.

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Q. As a matter of fact, as I understand it from my learned friend, and as the evidence shows here, you imposed on the purchasers the duty of having the surveys made?

A. Yes, they paid for the surveys.

Q. That is, you imposed the duty on the purchaser to get the land surveyed and have that data returned to your office? A. Yes.

Q. The Defendant Railway Company did not propose to do that and that was a duty they cast on the purchaser? A. Yes.

Q. Of course, you had to accept it? A. We accepted a survey that was— 10

Q. Of any surveyor of good standing? A. Yes.

Q. And Mr. Priest was as a matter of fact the surveyor who made the survey in this case? A. In this case.

Q. And there was no objection to him? A. No objection.

Q. You did not then as I understand it make it a matter of agreement to know exactly where the land was that the different applicants were in possession of until it came to a question of giving the deed, or in case of course it came in conflict with your operations any way? A. I don't quite understand you. 20

Q. It is a little involved but what I mean is—you did not make any enquiry as to where the applicant had located his place, say, and prosecuting his agricultural pursuits? A. No.

Q. And it only came to your notice when it came a question of deeding the lands? A. Or his making an application for it.

Q. Or in case your operations came in conflict with him in any way, like in this case, you found coal in the neighbourhood and then you wanted to find out who were the— A. Who were the locators of the land, the holders of the land. 30

Q. Now speaking of the Plaintiff, it is not contended by the Defendant Company that the Plaintiff made any misrepresentation to the Railway Company about anything is it? A. Misrepresentation. No.

The Court: There is no suggestion of anything of that kind.

The Witness: Of course, probably, according to his application if the land was surveyed where he applied for it it would not be the piece of land that he is on now.

Mr. McPhillips: Q. We will have expert testimony on that. After Mr. Trutch ceased to be Land Commissioner, Mr. Gore was the one who followed him. A. Yes. 40

Q. And then Mr. Solly? A. And then Mr. Solly.

Q. I believe you have made a change in the administration of your office as to agreements of sale or receipts given to applicants, have you not? A. Yes.

Q. Yes, you have drawn to their attention now the deeds that will be given—will be according to the usual reservations contained in the Company's deeds? A. Yes, that is it.

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Q. That was not in vogue at the time of this agreement for sale to the Plaintiff?
A. No, it was not.

Q. Then how long a time has that been the practice? Some 3 or 4 years, I think?

A. Oh, I forget now, I could not say. Probably 2 or 3 years, or 4 years, I could not say.

Q. That reservations would be according to the deed—the usual deed issued by the Company? A. That is the receipt given?

Q. Yes. The receipt given? A. Yes.

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Q. As a matter of fact, though, still you have no agreement settled by your solicitor as to the sale of lands? A. No, we do that ourselves; it is not necessary to do that; that is done privately in the office.

Q. That is part of the administration of the Land Commissioner's Department? A. Yes. Mr. Hobbs went to a lawyer; the lawyer saw "land" and then he nailed it on account of the legal term.

Q. You don't think Mr. Hobbs was setting any trap for you? A. No, I don't so, not at the time, because he did not know it, but when he took it to the lawyer, the lawyer sees "land," and then they nail it on the legal term "land."

Q. Is that the defence you rely on? A. No; because Mr. Trutch did not have power to sell the minerals, he sold the land.

RE-EXAMINED BY MR. POOLEY.

Q. There was one question Mr. McPhillips asked you here, when it was you knew that Mr. Hobbs claimed the coal? A. I don't know, it was after—

Q. Was it when he returned the deed? A. When he returned the deed on account 30 of the reservations?

Q. Yes? A. No, it was before that.

Q. You say before that he had claimed? A. It was before he returned the deed—no, it was before—he returned the deed after he knew that there was coal there—he returned the deed.

Q. Oh, no, that was not the question; Mr. McPhillips asked you this question: When was it you first knew that Mr. Hobbs claimed the coal? That Mr. Hobbs claimed the coal, not that the coal was found there? A. I cannot say the date. 40

Q. Was that when the deed was returned to you? A. When the deed was returned to me?

Q. Yes, the company issued him a deed? A. Yes.

Q. And the Plaintiff returned that deed on account of reservations in it? A. Yes.

Q. Was that the time that you say he claimed the coal? A. I think it was before that.

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Q. When was it? A. I could not say when it was—I could not say.

Q. That was not the first time? A. I could not say.

EXAMINED BY THE COURT.

Q. Which way am I to take this Mr. Dunsmuir, was it before or after Mr. Hobbs had returned the deed that he claimed the minerals? A. That I knew?

Q. Yes. Did you know anything of his claiming the minerals before he sent the deed back to you on account of its having the reservations? A. I don't know whether I knew it before that or not; but I know he returned the deed. 10

Q. You see Messrs. Hunter & Duff wrote a letter—or Mr. Hobbs wrote a letter—"I herewith return the deed" (reading letter.) Now was it before or after the receipt of that letter that you were aware that Mr. Hobbs claimed the minerals? A. Well, I could not say that. I forget about that. I could not say that, whether it was before or after

Q. It was not the Solicitors who wrote you that letter, it was Mr. Hobbs himself? A. I remember the deed being returned, but whether I knew that he knew it before that I cannot say, I don't know.

Q. You said in answer to Mr. Pooley that prior to the Esquimalt & Nanaimo Railway Bill, the Dunsmuir's had coal lands and carried on collieries? A. Yes. 20

Q. That was at Nanaimo? A. And Wellington, yes

Q. And Wellington. Well, who did they belong to then? Who conducted them? A. They belonged to my father.

Q. And the bill was passed in 1883? A. Yes.

Q. How long had he been carrying on those collieries? A. How long before that?

Q. Yes, before that? A. It was—he first commenced in October, 1869. 30

Q. Since 1869; and were these collieries extensive at the time the E. & N. Railway Bill was passed? A. Oh, yes, extensive, then, by that time.

Q. Now, you told Mr. Pooley the reason for taking up the E. & N. Railway Company by your father was to protect his own collieries? A. Yes.

Q. How? A. Because he would have all this coal land, you might say, as well he would have the monopoly of the coal; that was the reason; that is what he wanted.

Q. There was a large land grant with the railway project? A. Yes

Q. Was to get coal lands and so have a monopoly of the business? A. Yes, so as to protect his own. 40

Q. I understand; he did not want— A. Did not want some one else to come in,

Q. Then it would be altogether foreign to your purpose to sell coal lands? A. To sell that coal land, yes. And if we had sold the coal land we would not have sold it at \$3.00 an acre, the same as we were selling the surface rights to others.

Q. When you paid \$100? A. When we paid \$100 ourselves for it.

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Q. Well, now, in a word, this Esquimalt & Nanaimo Railway Company—you say that you got half? A. We have half.

Q. You have half? That is all? A. That is all.

Q. Half interest? A. Half interest; half the amount of stock.

Q. Half the interest in the entire stock? A. Yes.

Q. Is the other half owned by parties other than yourselves? A. Yes.

Q. How do you provide against a clash of interests? A. Well, we have the control in the directorship. 10

Q. Is that part of the agreement or what? A. No, not necessarily.

Q. How, then, could you secure control? A. Well, I don't care about telling those things, we have control in a way

Q. Well, there are arrangements under which you have control? A. Yes, we have control.

Q. Do not understand that I am trying to pry into your business, but I only want to know what the facts are? A. Well we have the control, we have the majority of the Directors. 20

Q. Yes, and your arrangements are such that you secure that control? A. We secure that, yes.

Q. Well, now, when was it that you discovered this coal in the neighbourhood of the land in question? A. I think it was in 1895. That is when, in August or September, I knew of it; but I think it was discovered before that by a man named Hodgson.

Q. And you are now working them, are you? A. Well, we are prospecting, driving a slope. 30

Q. Well, now, irrespective of the coal there is underneath, that is, irrespective of the value of the coal itself, does the discovery of mineral enhance the value of the surface? A. Of course it does. We have that right in our deed to go on the land that we sell, you see, and prospect and mine for coal, paying compensation for whatever damages we do.

Q. Yes, I know that; but what I want to know is, irrespective of the coal itself, the finding of coal will enhance the value of the surface? A. Yes.

Q. It was in knowledge then of the enhanced value that would refer to this land that you agreed to waive what you called the forfeiture? A. No, I did not want to take advantage of that. 40

Q. The land would be of more value? A. Yes, it would be more valuable, but I thought I would let him have the surface any way.

Q. It was with knowledge that the land would be more valuable that you concluded to let it go? A. Yes; I told Mr. Solly it was throwing money away to go into law about it, and Mr. Solly thought we had the mineral; but the surface we would give it to him or let him have it.

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Mr. McPhillips: Of course, my Lord, what he told Mr. Solly is not evidence.

The Court: No; only what he concluded to do.

The Witness: That is what I gave Mr. Solly instructions to tell Mr. Hobbs.

Q. I see that in Mr. Solly's letter of the 31st January, he says to Hunter & Duff (reading letter). Did you place the matter in the hands of the Company's solicitors? A. I did, yes. I told Mr. Solly to do so.

Q. Well, it seems as if you had not told Mr. Solly. He says you placed the matter in the hands of the Company's Solicitors, so that he, Mr. Solly, considered that the matter was out of his hands? A. Well, I don't know about that.

Q. You don't know about that? I suppose if they had any instructions in the matter they would have communicated with Messrs. Hunter & Duff? A. Well, Mr. Solly would.

Q. No; not Mr. Solly. You see Mr. Solly writes to Hunter & Duff, saying the reason why he has not replied to their letter is that you told him that you were going to put the matter into the hands of the Solicitors of the Company. I want to know if you did so? A. Yes; I did so.

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Q. Yes, at that time, January, 1896? A. Yes, I must have done so.

Q. Well, was it after advising with them, or of your own notion that you concluded to waive what you considered at first was a forfeiture of the land? A. I don't quite understand.

Q. I say, was it after consultation with your Solicitors, or without consultation with your Solicitors that you eventually concluded to waive what you considered was a forfeiture of the land? A. No, I never saw any solicitors about it.

Q. You acted without them? A. It was my own free—

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Q. It was without having any consultation with them? A. Yes.

Witness stands aside.

WILLIAM GEORGE PINDER, being duly sworn, testified. Examined by Mr. Pooley.

Q. Are you a Provincial Land Surveyor, Mr. Pinder? A. Yes.

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Q. Are you employed by the E. & N. Railway Company? A. Yes

Q. Did you make this plan, Exhibit "Z" (plan handed to witness)? A. I made that plan.

Q. Do you see a place marked here "Louis Stark's Crown Grant"? A. Yes, 3066.

Q. Is the position of the Crown Grant there accurately fixed—correctly fixed? A. Yes.

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Q. Did you lay on these other pieces, sections here? A. Yes.

Q. From what did you get the material to lay on those sections? A. From a tie line and also from my own surveys.

Q. Also from your surveys? A. Yes.

Q. Have you seen the receipt given by Mr. Trutch to Mr. Hobbs for certain land in that neighbourhood? A. Yes.

Q. Did you lay this piece of land down here colored blue according to that receipt? A. Yes, I did. 10

Q. Where did you get this portion of land colored brown from? A. Oh, I got that from a plan that I saw in Mr. McPhillips' office.

Q. And therefore you laid that down? A. Yes.

Q. And where did you get this from colored yellow? A. From Mr. Priest's survey.

Q. And those are correct? A. Those are all correct.

The Court: Q. Where is the tie line that you speak of? A. This (indicating). 20
Lot 1, Lot 17, Lot 2, I make from actual survey.

Q. All the Lots in Block 17, is that what it is? A. No, sir; Lot 2, Lot 4 and Lot 7. From actual survey.

Q. What about the tie line? A. A tie line from the boundary of the District; and Lot 6 by actual survey and Mr. Priest's survey as well. And that colored brown from the tracing in Mr. McPhillips' office.

Q. Being the tracing furnished by Mr. Gore, isn't it? A. Yes.

Mr. McPhillips: That is Exhibit "F." 30

The Witness: And the part marked blue from the description given by Mr. Hobbs, I think.

Q. You mean Mr. Trutch's receipt? A. Yes, Exhibit "C," that is it.

The Court: Q. And Lot 6 by actual survey and Mr. Priest's survey? A. Yes.

Mr. Pooley: Q. In your survey, Mr. Pinder, did you fix the actual position of Mr. Hobbs' cabin? A. Yes.

Q. You stopped there? A. I stopped there.

CROSS-EXAMINED BY MR. MCPHILLIPS. 40

Q. You found Mr. Hobbs' cabin about the centre of that piece of property Mr. Pinder marked yellow on that plan, didn't you? A. Yes.

Q. That is in the centre of Lot 6? A. That is in the centre of Lot 6 about.

Q. About—speaking generally? A. Yes, about the centre of Lot 6.

Q. And this Lot 6, if it were spoken of in the way of a different system of survey—dollars and cents system of survey—it would be part of Sections 10 and 11? A. It would be part of Sections 10 and 11, Cranberry District

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Q. Yes, part of them, and the balance— A. And the balance in Douglas District.

Q. In Douglas District; but according to the Railway Company's correction, they call it all Lot 6? A. Of Lot 6.

Q. You say you found the Plaintiff's cabin there. A. Yes.

Q. And you and your party stayed there, did you not? A. We stopped there.

Q. One night was it? A. We stopped there for—oh, no, we stopped there for about a week. 10

Q. In the Plaintiff's cabin? A. In the cabin.

Q. What kind of a cabin did you find it to be? A. A very cold cabin

Q. That may be; but I mean to say, as cabins go, it was above the ordinary, wasn't it? A. It had no windows in it.

Q. It had no windows in it? A. No, we had to put up some sacking to keep the wind out.

Q. They had been taken away, I suppose? A. And the door was off the hinges. 20

Q. There was a door? A. It was off its hinges; we had to put it up again. Such hinges as they were though.

Q. And you stayed in it for about a week, you and your party? A. Yes.

The Court: Q. What time of the year was it? A. That was in 1896, in the spring of 1896.

Mr. McPhillips: Q. It must have been earlier than April because Mr. Priest made his survey in April? A. It was earlier than April.

Q. About what month? A. I think he went shortly after I had concluded my 30 work around there.

Q. It must have been in March. You must have been there in March? A. Yes.

Q. When you told my learned friend that the description in Exhibit "C" would bring the land as you have defined it here in blue, you have assumed something haven't you? A. No.

Q. Nothing? A. No.

Q. You have taken the paper to mean—first, dealing with the distance, what did you take the distance to be? It says here about 2 miles west? A. Kindly let me see 40 (looking at Exhibit "C.")

Q. Answer my question, now, Mr. Pinder. The first thing you threw out of consideration was Bright District; it could not have been Bright District? A. No.

Q. It had to be in another district. It was Douglas District as a matter of fact? A. It was Douglas District.

Q. You had to abandon that. Then about the 2 miles, what did you with that? A. I laid it off, 2 miles.

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Q. You did not pay any attention to the word "about"? A. No, I laid it off 2 miles.

Q. And then it says west of Louis Stark's Crown Grant? A. Yes.

Q. It does not say west from any given point? A. It said west from the Crown Grant, from Lower Harewood Lake.

Q. No, I don't think you will find that there--no. So you located it somewhere else? A. In the application, that is where it was.

Q. You must have looked at the application as well? A. At the application, yes; ¹⁰ I looked at the application as well; I did not see this, but I saw a copy of this. Where is the application? (Application handed to witness.) Here it is. "A piece of dry land and swamp situated in or about 2 miles west of Stark's place and Harewood lake"--and there is Harewood Lake (indicating) "And Harewood Lake, Cranberry District."

Q. That is the first paragraph of the application? A. Yes.

Q. Well, then, you looked at the application as well as at this? A. Oh, yes.

Q. Even then, Mr. Pinder, as a surveyor you had not got a real starting point? A. ²⁰ Yes, from here.

Q. You assumed it? A. No, I did not; this is the real place.

Q. When it is said here about two miles west of Louis Stark's Crown Grant? That does not say two miles west within any lines, does it? A. Yes, it says--supposing it meant otherwise, it would say about west or in a westerly direction, but there it says west; it does not say about west, or it does not say about north or about south; it says west.

Q. You assume that that means due west? A. I do not assume it, I just take what I see on this paper and I laid it off on here.

Q. Now just look at the punctuation in that Mr. Pinder, It says, "Commencing--" ³⁰ A. I did not lay it off from that. I laid it off from the other other one.

Q. It says "Commencing at a point about two miles west"? A. It says west though, it does not say "about" west.

Q. You do not apply the "about" to the "west"? A. I take two miles and I apply it two miles west; I do not apply it any more or less. I apply it two miles. It says two miles there.

Q. You are in very narrow lines in your definition in this matter. It says in this agreement "about two miles west"? A. Well, would you have me make it about three ⁴⁰ miles west then, I could do that if you like.

Q. We have got it defined now well enough. You did find the cabin there, and your party stayed there about a week? A. Yes.

Q. The cabin was one of recent construction, or of some considerable time before, do you think? A. Oh, I don't know how long it had been constructed.

Q. It had been there for some time? A. Oh, yes, it had been there for some time, but I don't know.

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Q. You did not look around to see if there were any posts planted there. A. I did.

Q. Did you find any? A. I did not find any, there ought to be four, but I did not find any.

Q. Who would plant the four? A. Mr. Hobbs ought to have planted four posts there.

Q. Why should he? A. That is according to the Land Laws, the Land Act.

Q. But he was not taking up land under any Land Act. There was no requirement on Mr. Hobbs' part to plant any posts? A. I think so. 10

Q. That is your notion, but that is not a fact. Mr. Hobbs purchased this land, you see. Did you see any posts at all? A. That I surveyed here?

Q. On his land, yes? A. No.

Q. Mr. Priest spoke of a post, did you ever see it? A. No, I never saw it.

Q. There is a trail from Mr. Stark's place to Mr. Hobbs' cabin, or in the neighbourhood of it, is there not? A. There is a trail from Stark's place that runs right across there (indicating). 20

Q. It comes from Stark's in a northwesterly direction and crosses Mr. Hobbs' property? A. Yes.

Q. As now defined Lot 6. A. Yes.

Q. That is an old trail is it not? A. Oh yes, it is a well defined trail, a good trail.

Q. In fact, that is the way to make through the country—you follow that trail? A. No, you need not follow that trail at all.

Q. Suppose you wanted to go from Stark's to Hobbs' place? A. Oh then I would take the trail of course.

Q. You would then take the trail that you are speaking of? A. Certainly. 30

Q. I mean now if a man other than a surveyor—you are a Provincial Land Surveyor you say, Mr. Pinder. Now, one other than a Provincial Land Surveyor, or one without any technical knowledge, would he be liable to call that west of Louis Stark's place, where Mr. Hobbs' place is? A. I would call it west, yes, certainly; I would call it northwest.

Q. You would call it northwest now with the advantages of the survey? A. But you can see very well from up here where you are going when you get up on top of the hill. You can see the country around here. 40

Q. But, now, in the light of later events we might look at it differently; but go back to the year 1889 a man other than a surveyor without the knowledge that you have, and so on, he might call it west of Louis Stark's Crown Grant, might he not—the particular property? A. He might call it north.

Q. Would he call it north? A. No, he would call it northwest. Decidedly.

Q. What would tell him the point of the compass to start with? A. If a man goes in the woods he generally knows, if there is any sun, where the sun rises and sets.

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Q. Besides it is only north-westerly? A. Yes.

Q. How much north of west is it? You can tell me that as a surveyor how much north of west is it from Louis Stark's Crown Grant as defined there? A. Let us see. It is a mile and a half west.

Q. And his southern boundary is the northern boundary produced of Stark's Crown Grant? A. Yes, that is what it is.

Q. To speak graphically, it is a section of land lying immediately north of that, that you would define it? A. Yes.

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Q. Looking at west as being due west? A. Yes.

Q. And as you have shown it? A. As I have shown it.

Q. Where is that lake that is mentioned there (indicating)? A. This lake (indicating).

Q. Where is Harewood Lake? A. This is Harewood Lake This is Upper Harewood Lake (indicating) and this is Lower Harewood Lake (indicating).

Q. Now, I want to draw your attention to this: This application says it is on or about two miles west of Lower Harewood Lake Now, as a matter of fact, Mr. Pinder,²⁰ isn't this property absolutely due west of Lower Harewood Lake? A. Yes.

Q. Absolutely due west of lower Harewood Lake That is, Lot 6, the land defined now is absolutely due west of Lower Harewood Lake. And you find that language used in the application, it is "On or about two miles west of lower Harewood Lake." That is the Harewood Lake it means? A. I suppose so.

Q. And this Lot 6 is due west. I wish you would tell me the distance from Lower Harewood Lake to this Lot 6 as now defined? A. (Measuring.) That is a mile and a half.

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Q. Take it from lower Harewood Lake? A. It is just a Crown Grant.

Q. But we are dealing with this at the bottom of the application; it is about two miles west of Lower Harewood Lake? A. Yes, but that land goes south--

Q. Confine yourself please to my question, Mr. Pinder; you are not concerned with its effect. I ask you how far west of Lower Harewood Lake is Lot 6, as now defined? A. A mile and a half.

Q. A mile and a half due west?

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The Court: That is the boundary of the lot?

Mr. McPhillips: Yes, to the eastern boundary, my Lord.

Q. And to the other side of the lot it would be how far? A. Very nearly two miles.

Q. To the other side of the lot? A. Yes.

Q. That is the westerly side of Lot 6? A. Yes.

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Q. Do you know how far it would be by the trail that we have spoken of a little while ago, from Stark's to where Hobbs' house was built? A. I suppose about two and a half miles.

Q. You think it would be about two and a half miles by the trail? A. Yes.

Q. From Mr. Stark's Crown Grant, or his location of his Crown Grant, to Mr. Hobbs' house. A. Yes.

A. That is a trail with a good many sinuosities? It is not a straight trail, is it? A. It is a pretty direct trail. 10

Q. You think it a pretty direct trail? A. A pretty direct trail for a trail.

Q. It winds some anyhow? A. Certainly it winds some; it winds a little bit, but it is a pretty direct trail.

Q. You see, it could not be, Mr. Pinder, when you come to analyze it a little, you only find it a mile and a half from Lower Harewood Lake to the easterly boundary of Lot 6; how could you make up that mile and a half if it wound some? A. You have told me that it wound a little and I agreed with you. 20

Q. It might wind a mile? A. No, it does not wind a mile.

Q. It is apparent that the distance has to be made up somehow, hasn't it? A. Of course, it has to wind a little bit, but it is a pretty direct trail anyhow.

RE-EXAMINED BY MR. POOLEY:

Q. Mr. McPhillips has asked you here if this southern corner here of Lot 6 is a mile and a half from this Lower Harewood Lake? A. No, not to there.

Mr. McPhillips: No the easterly boundary. 30

The Witness: No to the district line.

Mr. Pooley: Q. I want to understand you. Mr. McPhillips asked you the question from the Harewood lake to the eastern boundary? How far is that? A. (Measuring.) About a mile and a half.

Q. That is what you said? Yes; Now you have got to that boundary and Mr. McPhillips wants to start from that? A. Yes.

Q. Now take the description of Mr. Trutch's receipt and work it out from that point; would that bring the brown part in as the proper piece? A. Certainly, it would. 40

Q. According to Mr. McPhillips' definition of the starting point? A. Yes.

Q. That would bring the brown part in as the property as described in Mr. Trutch's receipt? A. Yes. It says to go so many chains south, then west, then east, and then north to the point of commencement.

Q. Mr. McPhillips: That is something new. I want to go into that now.

By leave of the Court Mr. McPhillips further cross-examined as follows:

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FURTHER CROSS-EXAMINATION BY MR. McPHILLIPS:

Well now the application said about 2 miles west of Lower Harewood Lake, did it not? A. Yes.

Q. The lake was to be about 2 miles west of Lower Harewood Lake? A. Yes.

Q. Now, why did you put the land all south of Harewood Lake? A. Because here is the thing.

Q. You jump—you go to the receipt then do you? A. It says: Commencing at the top of a ridge running west to Berkeley Creek, thence south, down Berkeley Creek to 10 a corner post at a swamp, then east. It says—

Q. Yes, I know, but why do you put your starting point where Mr. Pooley was putting it? A. You put it there yourself.

Q. How did I put it there? A. You put it there yourself when you asked me about that Lot.

Q. I did not say it. A. You asked me how far it was from the Lower Harewood Lake to the corner of that Lot down there.

Q. I did not ask you that corner or any other corner? A. I held my rule there at 20 the time.

Q. You assumed that? A. No, I did not.

Q. I asked you if it is due west from Lower Harewood Lake? A. Yes, it is west.

Q. Why would you define a piece of land which would have to be due west of Lower Harewood Lake south of that—because you see you would put it where the brown piece is? A. Because I plotted this from both of these.

Q. That is the reason? A. That is the reason.

Q. And you worked it out according to the notion of the Defendant Company. A. 30 So that both these papers would check one another

Q. As they checked one another to the Defendant Company's notion of things. What I say is that brown piece? A. That brown piece is put on here according to two miles west of Louis Stark's Crown Grant, Cranberry District.

Q. Irrespective of Harewood Lake; you say this is defined here irrespective of Harewood Lake, because there is nothing about Harewood Lake in that receipt, you know? A. Yes, that is irrespective of Harewood Lake.

Q. But now, irrespective of Harewood Lake, Lot 6, as now defined, would be due west, would it not? A. But not from Louis Stark's Crown Grant. 40

Q. But the application does not mention Louis Stark's Crown Grant, you see.

The Court: Q. He is asking you to follow the application. A. Then, according to the application.

Mr. McPhillips: Q. It is due west of Lower Harewood Lake, isn't it, now—the property? A. I don't understand you.

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Q. Well now, excuse me; let me indicate, Harewood Lake is within the boundaries of Lot 6 to the east, is it not? A. But, do you want me to put it on the plan here according to this (indicating)?

Q. Answer the question first. Is not Harewood Lake within the boundaries of Lot 6 produced to the east? It practically is, is it not? A. It is.

Q. Now, if you go due west from Lower Harewood Lake? A. It takes me to here (indicating).

Q. If you go due west and defined a piece of property 160 acres in extent—just 10 follow me in that. A. No, I follow this piece of paper; that is what I follow.

The Court: You must follow the question.

Mr. McPhillips: Q. I ask you first whether Lower Harewood Lake is not within the boundaries of Lot 6, as now defined, to the east? A. It is to the east of Lot 6.

Q. And is within parallel lines produced? A. Yes.

Q. The north and south parallel lines produced? A. Yes.

Q. Now, we will start now at Lower Harewood lake, and we will go west. Do not look at this application at all. Now is not Lot 6, due west? A. If you look all over the 20 place

Q. Is not Lot 6 due west? A. Certainly it is due west.

Q. And consistent with the lines of Lower Harewood Lake? A. Well, it is due west from Lower Harewood Lake

Q. And consistent with the lines of north and south A. It is due west of Harewood Lake, that is what it is.

Q. And is not the north boundary and the south boundary similar to the north and south boundaries of the Lake? A. Yes. 30

RE-EXAMINED BY MR. POOLEY:

Q. But it is not consistent with the terms of that receipt, is it? A. No, it is not. Witness stands aside.

Court adjourned until 10:30 a.m. to-morrow.

SATURDAY, June 19th, 1897, 11 a. m. 40

Court met pursuant to adjournment.

EPHRAIM HODGSON, being called and sworn, testified. Examined by Mr. Pooley:

Your name Mr. Hodgson? A. My name is Ephraim Hodgson.

Q. Where do you live? A. I live at Harewood Lake; it is about five miles from Nanaimo.

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Q. At Harewood Lake. How long have you resided at Nanaimo and the neighbourhood? A. I have resided at Nanaimo and in the neighbourhood since 1885.

Q. Do you know the land in dispute in this action? A. Yes I do

Q. Coal has been discovered in the neighbourhood of this land has it not, Mr. Hodgson? A. Yes, it was shown to the Company some time about August, 1895.

Q. Who found that coal. A. Well, I found the coal.

Q. You found the coal? A. Yes.

Q. In consequence of your finding that coal did you do anything? A. Yes; after¹⁰ the coal appeared to be good, I came down to buy some land.

Q. You came down to buy some land? Well, what did you do? A. Well, I knew that Mr. Hobbs had a piece of land up there, and I came down to see Mr. Hobbs to buy his place; it was not far from the coal that I found.

Q. You came down to see Mr. Hobbs? A. Yes.

Q. Did you see Mr. Hobbs? A. Yes, I saw Mr. Hobbs.

Q. Where? A. In his shop on Douglas Street.

Q. Do you know about the date? A. It was during the Show week of 1895, I²⁰ think—the Agricultural Show.

Q. The Agricultural Show of 1895? A. Yes.

Q. Do you know about what date that would be? A. I think it was Wednesday or Thursday.

Q. About what date? A. I cannot just remember the date, I know it was right in the Show week, anyway.

Q. The end of September or the beginning of October? A. Yes, it was.³⁰

Q. The same year, 1895? A. 1895.

Q. Well, you say you went to see Mr. Hobbs? A. Yes.

Q. And you saw him? A. Yes.

Q. Where? A. In his shop.

Q. In his shop in Victoria? A. In his shop in Victoria.

Q. What occurred there? A. I asked him if he wanted to sell the land; and he said, well, he didn't know—he had kind of left the place.⁴⁰

Mr. McPhillips: If this is contradictory of Mr. Hobbs, my Lord, I submit my learned friend should confine himself to the questions that he put to him.

The Court: Yes, that is the rule. You can call Mr. Hobbs again if you like.

Mr. Pooley: I asked Mr. Hobbs the question if he told Mr. Hodgson that he had left the place, and he said "no."

The Court: Q. You saw him in his shop in Victoria and asked him if he wanted to sell; what did you say he did? A. He said he had kind of left the place and he said he

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would have to consult some one else before he could sell it, that was his brother. In other words it was not in a satisfactory state to sell; that is what he meant, that is at least the understanding I took from what he said.

Mr. Pooley: Q. He said he had to see somebody else? A. Yes.

Q. What else was said? A. And I said "All right." He said "You call to-morrow," and I said "All right; I will call to-morrow; I will see my brother to-morrow morning when he comes with his milk wagon."

Q. Did you call the next day? A. Yes, I called with my brother.

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Q. And then did you see the Plaintiff, Hobbs? A. Yes, I saw the Plaintiff, Hobbs.

Q. Now, just tell us what occurred then? A. Well, he said he did not care particularly about selling it, that it was all paid for, and he came to the conclusion that if the coal turned out good it would be a good place for a milk ranch and a good place to build a lot of cabins if the coal turned out good.

Q. If the coal turned out good? A. Yes

Q. And told you it was all paid for? A. And told me it was all paid for; and I started laughing at him; and I said you have only paid \$120.00 on it; and he said, "That is so; that is so."

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Q. Well was anything said as to the price? A. I said "I will buy that property and pay you cash right down if it is a reasonable price," and he said: "Well, I will tell you what I will do, I will take \$200 for it"

Q. Was there anything further said? A. I said "I will tell you—I will give you \$50.00 for your interest—the interest you have in it."

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Q. "Did anything else occur? A. Well, he said, "I won't take less than \$200.00. Of course," he said "I would like my money back. I have paid as you say \$120.00 on it, and I would like something besides what I have paid." And I said, "I will give you \$100.00, that is all I will give you." And I said, "Wait, I want to see the papers." And he gave me a paper the description of the land, and I said "If this is the description of the land, you want to sell, I will call the bargain off; I would not give you 50 cents for it; it is not the place at all that your house is on."

Q. The plaintiff stated here, that he asked you \$1000.00 for the land? A. Oh, it is not so. He asked me \$200.00. That is every cent he asked me.

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Q. Did the conversation that you have referred to take place in the presence of your brother? A. It did indeed sir. That is right, Mr. Hobbs, you cannot look at me, that is God's truth.

Q. Do not address the Plaintiff. Now I asked the Plaintiff in his examination here, if he had said anything to you about finding coal; if he said to you that you were pretty lucky in finding coal there? A. Well, Mr. Pooley, excuse me, I did not finish the conversation with regard to the sale of the land.

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Q. Well, very well, just tell the Court? A. He said, "No, that does not make any difference about that, where my house is, is the property, that is the place I want; and if you will give me \$150 I will go right down with you and have it transferred to you, and it will be certain."

Q. He said if you will give me \$150? A. And he says, "I will have this thing settled with you satisfactorily."

Q. Now, I asked him the question here, "Did you tell Mr. Hodgson that he had done pretty well about finding coal?" A. He said, "You found the coal there?" And I said "Yes." He said, "What a fool I was I knew there was coal there for years." 10

Q. Did he say anything further? A. I said, "You did? I suppose it is none of my business, but whereabouts did you find it." He says, "Oh, right on my place."

Q. I asked him the question whether he had said that he would show you the coal for \$100? A. Yes, he said he would show me the seam of coal for \$100; and I said, "All right, I will give you \$100, if the seam is any good?"

Q. Did anything occur? A. No, only he said, "Well you better give me that (\$150.00) and we will go down," and I said "No, I will give you no more;" and we left right there. My brother and I in company with each other. 20

Q. You say you have lived in Nanaimo since 1885? A. Yes, pretty much all that time since 1885; I went there in July 1885 to reside permanently.

Q. Did you know that the Company reserved their coal under their lands? A. Oh yes.

Mr. McPhillips: I object to what this witness knows about that, as no evidence against the Plaintiff.

Mr. Pooley: It is a question of public notoriety. 30

The Court: He has not answered that about public notoriety.

Mr. Pooley: Q. Was it a matter of public notoriety at Nanaimo?

Mr. McPhillips: I still object.

A. As far as my knowledge is, I think that it was. I know that from personally speaking with Mr. Shaw the agent and also from the late Mr. Dunsmuir.

Mr. Pooley: Q. Is there anything else that occurred in that conversation with Mr. Hobbs? A. Well, he said, what did I want with the place, and I said, "If that mine is worked out there," I said, "I want the place for a sheep ranch; it would be a handy 40 place for a ranch."

CROSS-EXAMINED BY MR. MCPHILLIPS:

Q. Now have you been in this Province since 1885? A. Yes.

Q. What is your occupation Mr. Hodgson? A. Just at the present time I am partly farming.

Q. Partly farming? A. Yes.

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Q. Where is your actual place of abode? A. Right at Harewood Lake.

Q. Right at Harewood Lake? A. Right at Harewood Lake.

Q. And what interest have you in this matter? A. I have none whatever.

Q. How does it happen that you are a witness here? A. Well, I have been prospecting a good deal for the Company.

Q. Yes; prospecting a good deal for the Company, that is the Defendant Company, the E. & N. Ry. Company? A. Yes.

Q. That is you are in their employ? A. Yes I am.

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Q. And have been and are? A. Have been off and on for about two years.

Q. And still are? A. Yes.

Q. For about two years. You were in the employ of the Company when you went to see Mr. Hobbs? A. Yes I was. I had been working for them for about a month I suppose.

Q. Had found coal, and made a good thing out of it for them? For the Company? A. For the Company.

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Q. Or for yourself? A. Oh yes, for myself.

Q. Not for the Company, you don't think? A. Oh, I don't know nothing about their business.

Q. No. Now, it was only a milk ranch you were going to see about this land for? A. No, sir.

Q. Only a milk ranch? A. No, sir; I said a sheep ranch.

Q. Sheep ranch. No other reason prompted you to go to see the plaintiff? None whatever? Although you were in the employ of the Defendant Company? A. That was always my motive; I went there for the purpose of buying the place for a sheep ranch.

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Q. How did you know that Mr. Hobbs owned any land in the neighbourhood? A. He left a notice in his cabin to the effect that things should be left in good care for the use of others and so on, and signed "F. V. Hobbs."

Q. He left a notice in his cabin to the effect that things should be left in good care for the use of others? A. The things in the cabin, with the dishes and stove and pan. The cabin should be left in good condition, and that there should be no fire left there to burn the cabin down.

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Q. And Mr. Hobbs left the notice there? A. Yes.

Q. And signed it? A. Yes.

Q. F. V. Hobbs. It did not look like he abandoned his land then did it? A. If an empty cabin is an indication of abandonment I should think it certainly would be.

Q. A good deal of life about it; when there was a notice of the owner up there, wasn't there? A. I don't think a notice is occupation. It is not for me to argue to you that a notice is occupation.

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Q. We will not deal with that. How did you know how much Mr. Hobbs had paid for this property? A. I had found out from Mr. Solly.

Q. You got in the confidence of the railway company that far? A. Not whatever.

Q. How did you know then? A. Well, I called in there to find out if Mr. Hobbs, as I had heard that he had abandoned his place, and I called in there to find out if it was so.

Q. And what was told you? A. I was told that he had paid \$120.00 and that he had evidently abandoned it—well, Mr. Solly said he has evidently abandoned it as he never has responded to any of my letters asking him to pay up.

Q. So that you went to buy an abandoned place from a man that had no right to it? A. I did not know that it was abandoned.

Q. Well, Mr. Solly did tell you it was abandoned? A. Yes; I only know what Mr. Solly said.

Q. And you thought then a notice stuck up in the cabin was an abandonment, too? A. The notice was not there any length of time after Mr. Hobbs left; any great length of time. I think it was pulled down by the hunters or something.

Q. Well, you knew Mr. Hobbs' land very well, then; you evidently thought about it a good deal? A. I knew it, I suppose, better than Mr. Hobbs.

Q. Yes, you knew it better than Mr. Hobbs. Now do you wish me to believe that you went there to buy this land to turn it into a sheep ranch? A. I do. And I told Mr. Priest before I ever saw the Company, that I was going to buy it.

Q. You did not know that there was coal on Mr. Hobbs' land? A. I thought probably there might be, there was indication of it.

Q. You thought probably there might be; and you would like to find some more coal for the Company—would you not have? A. That is my business.

Q. It would have been advantageous for you to find some more; a matter of profit for you to find some more would it not have? A. That is my business, what it would have been to me.

Q. His Lordship will define that. It would have been a matter of profit to find more coal for the Defendant Company? A. Well, I would have been paid so much by the day.

Q. And still more profitable if you had found land with coal on it, would it not? A. Certainly; the surface of the land would be enhanced in value.

Q. But even a little wider than the surface, like we are contending for here, if you found the land and the coal as well it would be more valuable to you? A. Certainly, it would. I wish I did own the coal.

Q. Yes, and if you could have got Mr. Hobbs' land which would carry the coal with it, it would have been of more value. A. If I could have got the coal, I would have given him \$150.00 all right.

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Q. You went there to get a transfer of his title whatever it was? A. Certainly.

Q. Yes, you wanted to get a transfer of his title. You knew more about his purchase evidently that he did, at first, anyhow. He said he paid all on it and you told him he only paid \$120.00. A. That is all.

Q. Then he said he would take \$200.00 for it? A. Yes.

Q. And you said you would give him \$50.00 for it? A. I told him I would give him \$50.00.

Q. What did you offer him such a ridiculous sum as \$50.00 for it for? Why did 10
you do that now? Isn't that ridiculous? A. No it is not ridiculous at all.

Q. It is not? A. No.

Q. Mr. Hobbs had bought this property away back in 1889, and coal had been discovered right close to it, he had paid \$120 and he had built a house, and it was some eight years nearly afterwards—no not eight years, about six years after that? A. The reason I offered him \$50.00, is that I considered his improvements just of that value.

Q. Just to that value. You could not build a house for that? A. He could build such a house as he had for \$25.00- 20

Q. That is what you think. Now then you said that he showed you some paper? A. Yes.

Q. What paper did he show you? A. He showed me some receipt he had got for the money—\$120.00.

Q. Are you a surveyor or an expert in describing land or anything of that sort? A. No, I don't know that I am.

Q. He showed you a piece of paper? A. He showed me a piece of paper.

Q. Did you read it over? A. Yes I read it. 30

Q. Do you think it was that paper (Exhibit C handed to witness)? A. I think this is the paper; it looks like it.

Q. Did you read it over, do you remember, at that time? A. Yes, I remember.

Q. And you said you would not give him fifty cents for it, if that was his title? A. Yes.

Q. Would not give him fifty cents for it, although you had been to Mr. Solly and found out that Mr. Hobbs had really purchased land right there; and the Company then 40
told you that; and yet when he produced his evidence of it, you said you would not give him fifty cents for it? A. I said I would not give him fifty cents for it.

Q. Oh, for the paper? A. Because it was not describing the place that he wanted.

Q. You are not concerned with what he wanted, or were you—it was land you were after? A. I told you what he wanted was land that I wanted to buy.

Q. Now you say you would not give him fifty cents for this land described in here? A. Described in there.

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Q. You wanted me to believe that. It was a sheep ranch that you wanted there?
A. Yes.

Q. That was what you wanted. But Mr. Hobbs' place was the ideal place you had before you, the proper place for the sheep ranch; no other place would have suited you in the neighbourhood? A. Well, it was the most centrally of where there was no settlers.

Q. Now, we will show you this plan, which has been referred to here (handed to witness). You see the blue block is where the Company say the description would fetch the land—would define the land. The yellow block you see there is where Mr. Hobbs' house is and the property in question; the brown piece is where even to-day Mr. Trutch took to be Mr. Hobbs' land. Now what variation is there in distance there? The brown piece and the yellow piece all form one block, if taken together, would they not?
A. Yes.

Q. Now, wouldn't that have done for a sheep ranch down there—this brown piece—very well? A. Well, you see Mr. Hobbs' place is most central and there is not likely to be any land sold out there; there would be no land called for there outside of that place.

Q. The brown piece is no good then? A. I don't think it is very much good; no.

Q. What is it like? A. Pretty much rocky.

Q. There are no swamps and ridges in that? A. What there is, is of such poor character that it is not worth while to go and purchase it.

Q. The fact of the matter is it is not agricultural land, the brown piece? A. There is none of it agricultural land.

Q. So that it was out of the question for Mr. Hobbs to take that brown place when he went on the land at the first instance? A. I don't know what he could have done.

Q. But it was not agricultural land? A. One man might look upon it as agricultural land and another man might think it was another thing.

Q. But you have changed your mind now? A. No, I have not changed my mind.

Q. Now, Mr. Hobbs said, "If you give me \$150 I will go right down and fix it up?" A. Have it transferred to me.

Q. That would not sound like a man who had abandoned his property, or had no title to it? A. No.

Q. The fact of the matter is you were up to Mr. Hobbs for a purpose of your own? A. For my own special.

Q. Yes, a purpose of your own? A. Yes.

Q. Was it your own purpose? A. It was my own purpose. I told him—I told Mr. Priest before I left I wanted to buy the place for that very thing.

Q. You pin your statement to that? A. Yes.

Q. For a sheep ranch? A. For a sheep ranch.

Q. And yet it was that identical spot you wanted and no other? A. It was the very place I wanted.

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Q. And you want me to infer that you are such an expert that on the reading of Exhibit C you knew at once that Mr. Hobbs had no title to the land? A. I knew it was not the land; I knew it did not describe the land on which his cabin was.

Q. Point out to me here? A. Because the cabin is on Cranberry District, and that described Bright District.

Q. That is why. Bright District—we have had that settled altogether? A. Why do you ask me the question if you have it settled.

Q. That it was Douglas? A. I can't help that.

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Q. But that was your reason, because Bright District was in there? A. Certainly.

Q. That is your whole explanation? A. That is my explanation.

Q. Why did you bring your brother up with you the next day? A. Why did I bring my brother?

Q. Yes. A. Why should I discard my brother when I was going to buy a piece of land?

Q. Who is your brother; what does he do? A. He works in Victoria now.

Q. What was he doing then? A. Living in Victoria?

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Q. And who was he working for? A. I could not tell you.

Q. You don't know that? A. No; I am not my brother's keeper.

Q. How was it you happened to bring your brother along? A. Because we were going out together; he says, "Where are you going?" and I said, "I am going down there," and I had not seen him for several weeks, and when I came to Victoria I stayed at his place and he went around with me.

Q. Why did you ask your brother to go with you? A. I did not ask my brother to go with me.

Q. Did you tell him where you were going? A. Yes.

Q. Did you tell him what you were going about? A. I told him what I was going about, and told him I had called in.

Q. You told him you would like very much for him to come along and hear what Mr. Hobbs said? A. Not at all; I had no motive in it whatever.

Q. Why did you bring him along? A. Because I told you we had always been going together when I came to Victoria. Naturally, as brothers would. I had no motive in taking my brother to hear what Mr. Hobbs said because my brother nor I never thought the thing would come up again.

Q. How did the railway company become aware of all these negotiations between you and Mr. Hobbs? A. I have already told you that I asked Mr. Hobbs if the land had been obtained.

Q. But after the interviews, how did the railway company become aware that you had gone to see Mr. Hobbs? After you had had these interviews how did they become aware? A. Because they told me I could have the place if Mr. Hobbs did not want it.

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Q. That is it?

The Court: Who told you that? A. Mr. Dunsmuir told me.

Q. Before you went to Mr. Hobbs or afterwards? A. Afterwards.

Mr. McPhillips: Q. You would like to jump this place of Mr. Hobbs? A. I did not jump it.

Q. You would like to? A. It is not what I like.

Q. Well, did you go down and tell the Company what took place between you and Mr. Hobbs? A. I went and I saw Mr. Solly. 10

Q. Immediately afterwards? A. Yes, immediately afterwards.

Q. And told him that that had taken place? A. No, I did not tell him all that had taken place.

Q. How much of it did you tell him? A. I told him I had seen Mr. Hobbs and evidently he did not intend to abandon the place.

Q. You told him you had seen Mr. Hobbs and evidently he did not intend to abandon the place; did you tell him anything else? A. No, I don't remember that I told him anything else. 20

Q. Did he seem interested to hear that? A. No.

Q. He did not? A. There was no expression in Mr. Solly's countenance one way or the other.

Q. No expression. You did not tell him any more than that? A. Not that I remember of.

Q. No. Not a bit more than that? A. Not that I remember of.

Q. Now, how is it that you tell more to-day—how did the Company know what took place between you and Mr. Hobbs other than the fact that he intended to abandon the place? A. Well, in what way? 30

Q. How did they come to know it more than that Mr. Hobbs merely intended to retain his interest in the place? A. Well, he went down after he found out that I wanted to buy the place from him—well, I said, "If you are not going to make up your payments of interest, I will buy the place from the Company."

Q. But how did the Company know more of this interview between you and Mr. Hobbs? A. How much more of this interview? 40

Q. You only told Mr. Solly that Mr. Hobbs intended to retain his place? A. Yes.

Q. But you have told us a good deal more to-day. How did the Company know? A. What is the more that you have reference to?

Q. Everything that took place, those conversations between you and Mr. Hobbs? A. If you will state what statements it is.

The Court: You know perfectly well what he wants to know.

The witness: No I do not know, your Lordship.

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The Court: He wants to know how the Company came to know of all the conversation that occurred between you and Mr. Hobbs when your brother was there as a witness to it. A. Oh it was afterwards; it was some time afterwards.

Mr. McPhillips: Q. How long afterwards? A. It was after Mr. Hobbs had claimed the minerals that the Company got to know the rest of the conversation.

Q. Did they send for you? A. No, they did not send for me.

Q. Did you volunteer this evidence? A. I saw Mr. Dunsmuir and he asked me what I knew about it. 10

Q. And it was then you told him? A. I told him what took place between me and Mr. Hobbs, just the same as I have told you.

Q. You were still in the employ of the Company? A. Certainly I was.

Q. Yes, certainly you were? A. I cannot remember—I don't know, I am just working by the day, I might not be in the Company twenty-four hours for that matter.

Q. You got into a little trouble up in your neighborhood a while ago? A. What trouble have you reference to?

Q. Any trouble? A. What trouble have you reference to? 20

Q. Any legal troubles? A. What legal troubles was there?

The Court: He asks you a question—Did you get into any troubles? You had better answer that.

Mr. Pooley: I don't think that has anything to do with the case.

The Court: I cannot tell whether it has or not, Mr. Pooley.

Mr. McPhillips: This witness has been called on a question of credibility, and I think I am within my province as Counsel to elicit that, which will have some bearing. 30

The witness: Well, I don't know what trouble you mean; if you will state what trouble I will tell you exactly, whether I have had or not.

Q. Any legal trouble I will say? A. Have I any legal trouble?

Q. Were you prosecuted in any Court of law at any time? A. Certainly I have been prosecuted.

Q. You have been prosecuted in a Court of law? A. Yes.

Q. In the Province of British Columbia? A. In the Province of British Columbia.

Q. On what charge? A. I was charged with the wilful murder of Louis Stark, of 40 Harewood Lake.

The Court: Q. The prosecution came to nothing? A. It came to nothing at all, only my confinement for 16 weeks. It was not the Government at all that took up the prosecution, it was entirely a private individual.

RE-EXAMINED BY MR. POOLEY:

Q. You have been asked Mr. Hodgson, a great deal about why you wanted this land. I think you stated in your examination in chief that the land was close to where you found the coal? A. Yes, not far from where I found the coal.

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Q. And is that what made the land valuable to you? A. Yes.

Q. I think you state that you told all this conversation to Mr. Dunsmuir after Mr. Hobbs claimed the mineral and you happened to see Mr. Dunsmuir A. Yes, certainly.

Q. Mr. Dunsmuir did not send for you? A. Mr. Dunsmuir did not send for me; the conversation took place in a cabin not far from my house, and down the lake side, which Mr. Dunsmuir can testify to the same thing.

Witness stands aside.

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HUTCHINSON HODGSON, being duly sworn, testified. Examined by Mr. Pooley:

Q. Your name, Mr. Hodgson? A. Hutchinson Hodgson.

Q. Where do you live now? A. 155 Fernwood Road, Victoria.

Q. Do you know the Plaintiff in this action, Mr. Hobbs? A. I have seen him several times. 20

Q. Where are you working now Mr. Hodgson? A. Working for Mr. Bland, foreman of the E. & N. Railway Company.

Q. You are working on the E. & N. Ry. Co's works? A. Yes.

Q. Now did you in 1895 or at any time see the Plaintiff, Mr. Hobbs. with your brother? A. Yes, I saw the Plaintiff, Mr. Hobbs, in the fall of 1895.

Q. In the fall of 1895? A. Yes.

Q. Was that the time you saw him with your brother? A. That was the time I 30 saw him with my brother.

Q. Now will you state what conversation took place in your hearing between your brother and Mr. Hobbs? A. Well, I went down with my brother, being the holidays, for the agricultural show; and when we got down to Pandora Street my brother said: "I will have to see Mr. Hobbs about his farm up there"; he says "We will go in there first"; so we went in, and my brother said "Have you seen your brother, Mr. Hobbs?" And he said "Yes." "Well" he said, "what arrangements did you make?" "Well" he said, "I don't know," he said "I would like to sell it, and I don't like to sell it." But he said "At any rate, I will take \$200.00 for it if you pay me cash down." 40

Q. "At any rate, I will take \$200.00 for it if you pay me cash down"? A. Yes. So my brother bid him \$50.00, and then they talked about coal and one thing and another about the place; he said to my brother, he says: "You made a big thing in finding coal out there"; and my brother said "Yes." And he says "What a fool I was, I knew there was coal out there years ago."

Q. Yes. A. And then they went on talking about what the place would be useful for and one thing and another, and Mr. Hobbs said: "Well, if the coal turns out good";

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he says "it will be a good thing for that place; you could build 100 cabins on that for miners."

The Court: Q. Who said that? Mr. Hobbs. A. Yes, my Lord; and he says, "It is also a very good place for cattle."

Mr. Pooley: Q. For cattle? A. For cattle. And then my brother says, "Let me look at your papers"; and Mr. Hobbs says, "I don't know whether I have got them here or not, but I will have a look in the office." So he went into the office and produced the paper, and my brother read it; and before he produced the paper my brother says, "I will give you \$100 for it." Well, he says, "Let me look at your papers first." And he brought the paper out as a receipt, and he said as soon as he read it, "Mr. Hobbs I would not give you fifty cents for it." Mr. Hobbs said, "Why." And my brother told him it was not the land represented that was on the paper where his cabin was. And he said he was going to have that land anyway, that was the land he wanted. So I read the paper over, too, And I told Mr. Hobbs then that he had not one atom of claim to it, he had forfeited his right to the property, he had not fulfilled his agreement with the Railway Company; it was not even in his power to sell it to us. And he says, "I will tell you what I will do, Mr. Hodgson, anyway, I will take \$150 and go right down to the Company now and have it transferred over to you." "No," my brother says, "I wouldn't have anything to do with it under any circumstances." And with that we left.

Q. With that you left. A. Yes.

Q. Now, Mr. Hobbs yesterday stated that he made the offer there to your brother of \$1,000.00? A. He did not, sir. There never was a \$1,000.00 mentioned about anything. It was \$200.00 he asked him, and no more.

Q. Now, did anything else occur that you can recollect? A. Well, I don't exactly remember of anything else at present.

Q. How long have you resided in Nanaimo—where did you live? A. I have lived in Nanaimo at three different occasions; I lived there in some part of 1885 and 1886; and I think it was in 1889 and 1890. I was working for the Vancouver Coal Company there—I think that is the year—and I have lived there in 1895—in the Spring of 1895.

Q. Did you know that the Railway Company reserved their minerals? A. I knew from parties saying so.

Mr. McPhillips: I object to that.

The witness: I didn't know it for a fact. It was generally talked about.

Mr. Pooley: Q. It was generally talked about? A. Any one that spoke about the land question. I came out here to start ranching and when I came with the intention, of course, it was natural for me to ask how the land was sold, and under what restrictions, and the price, etc.

CROSS-EXAMINED BY MR. MCPHILLIPS:

Q. Now, you say Mr. Hobbs produced some paper, and you read it over? A. Yes sir, I read it.

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Q. Do you remember what was in it now? A. Oh yes. I remember a portion of it.

Q. What did it say? A. The terms of payment, what I think is 25 per cent. down, and equal instalments in 1, 2 and 3 years; but I think it was 6 per cent., but I am not positive.

Q. Had you much acquaintance with buying and selling land, and terms of sale?

A. Well, only I have had a little; I have a little property of my own; I have bought a little and I have sold a little.

Q. You were prepared after you read this receipt to say at once that Mr. Hobbs had no right to the particular land that he had built his cabin on, and further that he had no right under the agreement anyhow because he had not made his payments? A. He had not made his payments and he had forfeited his rights according to the agreement.

Q. You think the agreement read that way? A. Certainly, it says 25 per cent. down, and some date, and one, two and three years.

Q. And it said if he did not pay the balance within a particular time the land would be forfeited? A. That is generally the thing.

Q. But did it say that? A. No, it did not. I did not see the agreement like that, no.

Q. Did any lawyer tell you that an agreement like this would be forfeited if the instalments were not paid? A. If I made an agreement with you to pay it in a certain time and I did not pay it, I would expect you to bring it into Court.

Q. You think that is what the law is? A. That is the law at the present time.

Q. You would be astonished to know that that is not the law at all? A. Any man that makes agreements that don't fulfil the agreement he loses all the claim.

Q. You are in the employ of the Defendant Company, now, you have stated you are working for the Railway Company, are you not? A. Yes, for the Railway Company's employees.

RE EXAMINED BY MR. POOLEY.

Q. Were you working for the Railway Company when you went with your brother? A. No, sir.

Q. You were not? A. I was not.

Q. What were you doing then? A. I have been working around the city for myself for about five years.

Witness stands aside.

Mr. Pooley: That closes the Defendant's case.

Mr. McPhillips: There is only one thing, my Lord—I asked in examination in chief whether any statements were made to Mr. Hobbs about the reservations at the time he agreed to purchase; since then, Mr. Trutch has gone into the box, and the extent of his evidence is merely that it was his custom to inform applicants that minerals were reserved,

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and he does not remember telling the Plaintiff personally. All I can do is to call the Plaintiff to swear positively that he was not informed of the reservations.

The Court: He swore to that distinctly.

Mr. McPhillips: Therefore, I do not think I will call any evidence in rebuttal.

The arguments of Counsel here followed; upon the conclusion of which the Court rose, judgment being reserved.

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REASONS FOR JUDGMENT OF THE HONOURABLE THE CHIEF JUSTICE.

DAVIE, C. J.

This is a suit for specific performance of a contract entered into by Mr. Trutch, as the Land Commissioner of and acting on behalf of the Defendant Company, for the sale to the Plaintiff of certain lands of the Company. The contract was dated 28th November, 1889, and took the form of a receipt signed "John Trutch, Land Commissioner," acknowledging payment by Mr. Hobbs of \$120, "being a first payment on account of his purchase from the E. & N. Ry. Co. of 160 acres of land in Bright District, at the price of \$3.00 an acre (describing the land); the balance of the purchase money to be paid in three equal instalments of 75 cents an acre at the expiration of one, two and three years from date with interest at the rate of 6 per cent. per annum."

It is not denied that the receipt, if otherwise binding, constitutes by virtue of payment of the instalments (although after time) and the bringing of suit to enforce it, a mutual agreement for sale of the land (Sec. 470, Fry on Specific Performance, 3rd Ed., and cases collected in Canadian Law Times, 1894, p. 312), and that its *prima facie* effect would be an express contract for sale of the minerals and all Defendant's interest in the land (Bower v. Cooper, 2 Hare 408), "*a caelo usque ad centrum*." On the 6th April, 1892, the Defendants' Land Commissioner, Mr. Gore, replying to Plaintiff's letter asking the Defendants to name a person to survey the land and to give certain information for the purpose of the survey, wrote to the Plaintiff intimating the Company's approval of Mr. Priest as surveyor and enclosing a tracing which described in red the Plaintiff's land, as taken from the description furnished by the Plaintiff upon his application to purchase. In June, 1893, and on 15th February, 1894, the Defendants' Commissioner wrote Plaintiff, calling his attention to non-payment of instalments and interest and requesting payment. Soon after this the Company discovered coal under or in the immediate vicinity of the land now in question. In November, 1895, the Plaintiff applied to complete the purchase, but the then Land Commissioner, Mr. Solly, after consulting with Mr. James Dunsmuir, the Vice President, claimed that the agreement was forfeited owing to the lapse of time and the neglect of the Plaintiff to pay any attention to the letters of June, 1893, and 15th February, 1894, demanding payment. Afterwards, however, the Defendants concluded to allow Plaintiff to complete his purchase, and on the 2nd March, 1896, Mr. Solly wrote the Plaintiff that he was instructed to inform the Plaintiff "that the Company are now prepared to issue a con-

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veyance to you of the land you agreed to purchase in Douglas District providing that within two months from date you have the land surveyed and the notes sent in to this office, and also pay up the overdue charges on the same," amounting to \$499.60, which included interest \$129.60, and title fee \$10. The Plaintiff accordingly had the land surveyed by Mr. Priest, the survey was accepted by the Company on the 11th of April, and the required moneys were duly paid within the time mentioned in Mr. Solly's letter. There is a variation between the description of the land in Mr. Trutch's receipt and as finally surveyed, the one being described as in Bright District, whereas the survey and the subsequent instructions of the Defendants' Commissioner place the land partly in Douglas and partly in Cranberry Dis-
tricts. It would seem that the first description would locate the land within timber limits already disposed of by the Defendants. However, there is no dispute on the score of location, and I think the variation is immaterial, Plaintiff having from the first located on the land now in question and having built a cabin there and made some other trifling improvements. The only question now raised is as to the coal and minerals under the land; facilities for extracting them, and the cutting of timber for railway purposes. The Defendants have tendered Mr. Hobbs a conveyance which reserves the mineral and other privileges, and this conveyance the Plaintiff has refused to accept. The Defendants say that they had no intention of parting with the minerals or of conveying anything beyond
bare surface rights, and, moreover, that Mr. Trutch had no authority to sell land except subject to the reservations of their usual printed form of conveyance, which was the form tendered to the Plaintiff in this case, and that a contract for anything else proceeded wholly upon mistake.

The Court will not assist a plaintiff in taking advantage of the plain mistake of another, and as the mistake cannot be established without evidence, a defendant is permitted in a suit for specific performance to support his defence by evidence dehors the agreement; *Chinnock vs. Marchioness of Ely*, 4 DeG. J & S., 638. This at once disposes of the objection of the Plaintiff's counsel against evidence of what is termed the in-
door management of the Company. In *Manser v. Back*, 6 Hare 443, premises were advertised to be sold according to certain printed particulars and conditions of sale. Just before the sale took place the vendor determined to reserve a right of way to other premises, and so notified the auctioneer by handing him a copy of the printed conditions, altered so as to make the reservation. In selling, the auctioneer read the altered conditions, but the party who became the purchaser did not hear, or observe the alteration, nor had he observed any of the amended particulars, some of which were distributed in the auction room. The purchaser and the auctioneer (the latter inadvertently) signed the contract for sale, minus the reservation; the purchase money was paid and possession
given. The purchaser having brought suit for specific performance of the contract without reservation of the right of way, the bill was dismissed on the ground that the auctioneer's authority to sell without the reservation had been revoked, and that it was competent for the defendant to insist on such revocation, and to adduce parol evidence of such revocation although uncommunicated to the Plaintiff. *Barnard vs. Cave* 26 Beaven, 253, was the case of an agreement between a brewer and a publican for a 14 years lease, nothing being said about taking the brewer's beer, or that it was to be what is termed a "brewer's lease," yet the Court being satisfied of the brewer's intention to grant only a "brewer's

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lease," refused specific performance except on terms of a covenant to take the Defendant's beer. In *Helsham vs. Langley* 1 Y. & C. 175, on a bill for the specific performance of an agreement by which A, as agent for B, contracted to let C a piece of ground for a term of years at a yearly rent, it appearing from the evidence that B intended to let the ground for the building of houses of a particular class, and that in authorizing A to act as agent in the letting of the ground he had told him the purpose for which it was to be let, it was held by Vice-Chancellor Shadwell, that as the agreement did not contain any reference to building nor any covenant to build, it was not, under the circumstances, such an agreement as ought to be performed. It becomes necessary therefore, to inquire into the facts connected with the Defendants' real intention respecting sales of their property, and as to Mr. Trutch's authority as land agent with reference thereto. It appears that the late Robert Dunsmuir owned and operated extensive collieries in the neighbouring district of the land in question. So as to shut out opposition and the opening of competing mines, he contracted with the Dominion Government to build and operate a railway from Wellington to Victoria in consideration, among other things, of an extensive grant of public land expressly including all coal and base minerals thereunder, and comprising the present land and all Crown land within many miles of his collieries. He formed the Defendant Company, taking himself one half of the capital stock thereof, and so arranging affairs with the other shareholders as to retain himself a controlling interest upon the directorate. Under the terms of the Government Grant, bona fide squatters were entitled, subject to certain limitations, notwithstanding the Company's grant, to a conveyance of the freehold of the surface rights of the squatted land to the extent of 160 acres to each squatter at the rate of one dollar an acre, and it was also provided that the land to be conveyed to the Company should, except as to coal and other minerals, and also except as to timber lands as hereinafter mentioned, be open for four years to actual settlers for agricultural purposes at the same rate of one dollar an acre to each actual settler, and that in any grants to settlers the right to cut timber for railway purposes, etc., should be reserved. Apart from the agreement now in question, the Company have only once made any sale of mineral rights, and that was to Mr. Dunsmuir himself, who paid the Company therefor at the rate of \$100 per acre. The transaction with the Plaintiff was after expiration of the four years limited for the incoming of settlers, and after the death of Mr. Dunsmuir, whose duties as President of the Company devolved upon his son, Mr. James Dunsmuir, who became Vice-President of the Company. The evidence is clear and uncontradicted that Mr. Trutch's duties as Commissioner were limited to the disposal of surface rights according to the printed form of conveyance in use by the Company, which has never been deviated from, and both Mr. Trutch and Mr. Dunsmuir swore that there was no idea in the Plaintiff's case of parting with anything except surface rights. The Company's upset price after the expiration of the four years was three dollars an acre, and grants were always made on the Company's forms. There was clearly, then, a mistake on the part of Mr. Trutch in entering into an agreement the legal effect of which is so startlingly at variance with his instructions. In this connection the question of ratification becomes quite immaterial. In ratifying Mr. Trutch's contract, which the Company undoubtedly did (and it must be remembered that their ratification related back to the date of the original contract, see *Bolton Partners vs. Lambert*, L. R. 41, C. D. 295, followed in *In re Portuguese Con. Copper Mines, Ltd.*, L. R. 45, C. D. 16), they fell into the same mistake as to its legal effect which Mr. Trutch did in

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making it. The ratification can stand on no higher ground than the contract, and having occurred under palpable mistake neither is it to be enforced by action for specific performance, although such mistake is unconnected with the conduct of the party seeking to enforce the contract and proceeds entirely upon the misconception of the party against whom the contract is sought to be enforced: *Mason vs. Armitage*, 13 Ves. 25; *Day vs. Wells*, 30 Beav. 224, and *Fry on Specific Performance*, Sect. 752, 3rd Ed., where the law is thus laid down: "Mistake may be of such a character as in the view of a purely common law court to avoid the contract on the ground of want of consent, or of total failure of consideration. But equity does not confine the defence of mistake to these cases. The principle upon which it proceeds is this, that there must be a contract legally binding, but that is not enough; that to entitle the Plaintiff to more than his common law remedy the contract must be more than merely legal; it must not be hard or unconscionable, it must be free from fraud, from surprise and from mistake, for where there is mistake there is not that consent which is essential to a contract in equity: *non videntur qui errant consentire*." It was urged during the argument that the mistake was one of law only, and that although specific performance is excused where a mistake of fact has arisen, yet everyone is presumed to know the law and a mistake of law will not excuse; but this contention is, I think, fallacious. In *Cooper vs. Phibbs*, L. R., 2 H. L. 170, Lord Westbury says: "It is said '*Ignorantia juris haud excusat*,' but in that maxim the word '*jus*' is used in the sense of denoting general law, the ordinary law of the country. But when the word '*jus*' is used in the sense of denoting a private right that maxim has no application;" and in *Earl Beauchamp vs. Winn* L. R. 6, H. L. 234, Lord Chelmsford says: "The rule *ignorantia*, etc., applies where the alleged ignorance is that of a well known rule of law, but not where there is a matter of law arising upon the doubtful construction of a grant." There are many cases to be found in which equity upon a mere mistake of law, without the admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such a mistake. As I am of opinion that specific performance in this case must be refused on the ground of mistake, I do not propose to consider the Defendants' objection that the Plaintiff is disentitled by reason of his laches, further than to say that such laches have probably been condoned by the Defendants in receiving the delinquent instalments and permitting the Plaintiff to complete. In *Bloomer vs. Spittle*, L. R. 13 Eq. 427, a case somewhat the converse of this, the Defendant held, in a conveyance which should have been of the fee simple, reserved to himself the minerals. The mistake was that of the Plaintiff's Solicitor, and was not discovered for several years, and the Defendant denied the mistake, but died before the hearing. Under the circumstances Lord Romilly, M. R., held that there had been a common mistake, but thought that he ought not compulsorily to alter the deed and so force upon the Defendant a instrument he had never executed. He, therefore, gave the Defendant the option of rectifying the deed or of having the whole transaction set aside, and in the latter case the Defendants would have to repay the purchase money with interest, Plaintiff fixed with an occupation rent, and there was an enquiry as to the amount Plaintiff was entitled to in respect of repairs and lasting improvements. A decree somewhat of this kind is what I think will meet the justice of this case. The Plaintiff is entitled to damages if the contract is set aside, for although the mistake shields the Defendants from specific performance, it does not in any way disturb the validity of the contract nor its

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ratification by the Defendant Company, which I think the evidence abundantly establishes. Before the judicature practice this suit would have been dismissed without prejudice to the Plaintiff's proceeding at law for recovery of damages. Now it is the duty of the Court to dispose of the whole question at once. In *Tamplin vs. James*, L. R. 15, C. D. 215, James, L. J., remarks concurring with Brett, L. J. "I am also of opinion that where an action is brought for specific performance and specific performance is refused on the sole ground of mistake by the Defendant, the Court ought to give the same damages as would under the old practice have been given in an action at law." The measure of those damages is that adopted by the M. R. in *Bloomer vs. Spittle*, which complies with the rule laid down in *Rowe vs. School Board for London*, L. R. 36 Ch. D. 622, that where no fraud or bad faith is attributable, the Plaintiff can only recover whatever money has been paid by him, with interest and expenses, and nothing in damages for the loss of his bargain. *Bain vs. Fothergill*, L. R. 7, H. L. 158. The Plaintiff has himself committed no act disentitling him to damages as in *Hipgrave vs. Case*, L. R. 28, C. D. 356, nor is this a case where the contract has become incapable of specific performance as in *Lavery vs. Pursell*, L. R. 39, Ch. D. 508, or impossible of performance as in *Ferguson vs. Wilson*, L. R. 2, Ch. App. 77. The Plaintiff swears that at the time of entering into the agreement he believed and had no reason for disbelieving that the minerals passed. I am not quite sure what would have been the effect if this had been otherwise. See *Cato vs. Thompson*, L. R. 9, Q. B. D. 616, but compare *Barnard vs. Cave*, 36 Beav. 253. The only expenses in this case would seem to be the costs of the buildings erected by the Plaintiff, and costs of surveying the land. Decree, therefore: Give Plaintiff the option of accepting the conveyance tendered, in which case the action will be dismissed without costs, following the remark of Lord Romilly in *Day vs. Wells*, 30 Beav. 224. I should not think of giving costs in a case where the mistake has been produced by the Defendants, or at option of Plaintiff, award damages for breach of contract, i. e. return of moneys paid with 6 per cent. interest from respective dates of payment, also compensation for his expenses, which will include his own time and labour upon the cabins and other improvements and in the survey. Let an inquiry as to those amounts be held by the Registrar, if so desired I will fix them. For the same reason as in *Day vs. Wells*, there will be no costs to either party, either up to and including the hearing. Further costs will be reserved.

ORDER FOR JUDGMENT.

SATURDAY, 19th June, 1897: 40

BEFORE THE HONOURABLE THEODORE DAVIE, CHIEF JUSTICE:

This action coming on for trial on the 17th, 18th and 19th days of June, 1897, before the Honourable Theodore Davie, Chief Justice, in the presence of Counsel for the Plaintiff and Defendants, and upon hearing the evidence of the witnesses on behalf of the Plaintiff, viz., of Frank Vicker Hobbs, Ralph Bramley, Allan G. Murray, C. C. Pemberton and Elijah Priest, taken *viva voce* at the trial and upon reading parts of the evidence of John Trutch, Leonard H. Solly, James Dunsmuir and Thomas Sinclair Gore, taken upon exam-

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ination for discovery and put in on behalf of the Plaintiff and upon hearing the evidence of the witnesses on behalf of the Defendants, viz., of John Trutch, Thomas Sinclair Gore, Leonard H. Solly, James Dunsmuir, William George Pinder, Ephraim Hodgson and Hutchinson Hodgson, and upon examination of all the exhibits produced by the Plaintiff and the Defendants, and upon hearing what was alleged by Counsel on both sides.

This Court doth adjudge that specific performance of the agreement of the 28th November, 1889, as set out in the third paragraph of the Plaintiff's Statement of Claim be refused—and doth declare that the Plaintiff shall be entitled to receive at his option the conveyance of Lot 6, Douglas District, as tendered by the Defendants to the Plaintiff, as set out in paragraph 8, of the Plaintiff's Statement of Claim, in which case this action will be dismissed without costs or that the Defendants shall return the moneys paid to them by the Plaintiff with interest thereon from the respective dates of payment at the rate of 6 per cent. per annum, and further, that the Defendants shall repay to the Plaintiff compensation for his expenses for the improvements placed by him upon the said land, which shall include his own time and labour and shall further repay to the Plaintiff the costs incurred by him in the survey of the said land. Let an enquiry as to these amounts be held by the Registrar of the Supreme Court, or if so desired the Court will fix them.

And this Court doth further adjudge that there will be no costs of either party up to and including the hearing. And let the consideration of further costs be reserved and any of the parties are to be at liberty to apply to this Court as they shall be advised.

By the Court.

HARVEY COMBE,

Dep.-Registrar.

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NOTICE OF APPEAL.

Take notice that the Plaintiff (appellant) appeals from the judgment of the Honourable Theodore Davie, Chief Justice, and the whole of the order and decree thereon of date the 19th day of June, 1897, and entered herein on the 26th day of July, 1897, wherein it was ordered that specific performance of the agreement of the 28th of November, 1889, as set out in the 3rd paragraph of the Plaintiff's statement of claim be refused, and it was declared that the Plaintiff should be entitled to receive at his option the conveyance of Lot 6, Douglas District, as tendered by the Defendants to the Plaintiff as set out in paragraph 8 of the Plaintiff's statement of claim in which case this action would be dismissed without costs or that the Defendants should return the moneys paid to them by the Plaintiff with interest thereon from the respective dates of payment at the rate of six per cent. per annum, and further that the Defendants should repay to the Plaintiff compensation for his expenses for the improvements placed by him upon the said land which should include his own time and labour and should further repay to the Plaintiff the costs incurred by him in the survey of the said land. And that an enquiry as to these amounts be held by the Registrar of the Supreme Court or if so desired the Court would fix them.

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And it was further ordered that there would be no costs to either party up to and including the hearing; and that the consideration of further costs should be reserved and any of the parties were to be at liberty to apply to said Court as they should be advised.

And further take notice that the Full Court will be moved, in appeal, at the Law Courts, Bastion Square, Victoria, B. C., on Monday the 10th day of January, 1898, or so soon thereafter as the said Court shall sit and Counsel can be heard, by Counsel for the above named Plaintiff (appellant) that the judgment and order be set aside and that it be ordered that the Defendant Company (respondents) do specifically perform the agreement of the 28th day of November, 1889, and that the Defendant Com-¹⁰pany (respondents) be ordered to execute a deed of conveyance in fee simple of the said land to the Plaintiff (appellant) without reservations, save such as are contained in the Defendant Company's (respondents') original Grant from the Crown.

The grounds amongst others, upon which the Plaintiff (appellant) appeals, are, as follows:

1. The evidence shows that the Defendant Company was the owner of a large area of land and in the management thereof, as distinguished from its railway business, had a separate department styled the Land Department and a distinct executive officer, styled²⁰ the Land Commissioner.

2. The Plaintiff on the 28th day of November, 1889, went to the office of the Defendant Company and agreed to buy the land in question receiving from the then Land Commissioner of the Defendant Company, Mr. John Trutch, an agreement in writing of said date signed by John Trutch, Land Commissioner, the said paper writing having printed thereon the name of the Defendant Company and the words "Land Department."

3. That the Plaintiff according to the evidence and finding of the learned trial judge was unaware and was not made aware of any intended reservations of minerals, and no reservations are contained or notified in the said agreement or contract of sale of the land of date the 28th day of November, 1889.

4. The evidence shows that John Trutch was held out by the Defendant Company as an agent having full authority to contract on its behalf in respect of sales of land.

5. The contention of the Plaintiff is that he is entitled to specific performance of the agreement of the 28th of November, 1889, and a conveyance of the land to him in fee simple without reservations of any other kind than the usual reservations as contained in⁴⁰ the original grant to the Defendant Company from the Crown.

6. According to the evidence and to the finding of the learned trial judge there was a sufficient agreement to satisfy the Statute of Frauds. The learned trial judge in his reasons for judgment stating "It is not denied that the receipt, if otherwise binding, constitutes by virtue of payment of the instalments (although after time) and the bringing of suit to enforce it a mutual agreement for sale of the land, and that its *prima facie* effect would be an express contract for sale of the minerals and all Defendants' interest in the land '*a caelo usque ad centrum*.'"

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7. It is submitted that the agreement for sale of the land is binding on the Defendant Company according to its legal effect that Mr. John Trutch in contracting was acting within the apparent scope of his authority.

8. To affect the Plaintiff with any limitation of authority in the Land Commissioner it was incumbent on the Defendant Company to show that the Plaintiff knew that there was a restriction upon the general powers of the Land Commissioner the sale of land being within the scope of his apparent authority, and there is no evidence to support the Defendant Company in this.

9. The agreement of the 28th day of November, 1889, is silent as to the estate to be granted. It is submitted that no less estate being specified the agreement is for the sale of the fee simple, *i. e.*, the vendors' (the Defendant Company's) interest ¹⁰

10. It is submitted that in the absence of any conditions or contract to the contrary the Plaintiff is entitled to have conveyed to him all that the Defendant Company can convey, which is the fee simple—without reservations of any kind—save subject to the reservations in the Defendant Company's grant from the Crown.

11. It is submitted that at most the evidence for the Defendant Company shows that Mr. John Trutch was verbally advised to sell land reserving the minerals, although he was held out as Land Commissioner and no limitation on his authority was published or brought home to the plaintiff. The evidence being that the Plaintiff swears positively that he was not advised of any reservations and Mr. John Trutch fails to state that any reservations was stated to the Plaintiff. Upon such a state of facts when the agreement is in its nature plain no mistake can, it is submitted, be set up. ²⁰

12. It is submitted that the evidence does not support a case of mistake. The evidence shows that the Defendant Company was careless and relied only on the Land Commissioner verbally notifying purchasers that the minerals were reserved, and the evidence in this case negatives such notification and there was no knowledge in the Plaintiff of any reservations. ³⁰

13. The agreement of sale is not ambiguous in its terms and it is submitted that the learned trial judge erred in law in holding that the Defendant Company is entitled to evade performance of it by the simple statement that the Land Commissioner made a mistake.

14. It is submitted that the secret instructions of limitation of authority to the Land Commissioner can in no way avail the Defendant Company they were in their nature verbal and in the way of its indoor management. And it is submitted that the Plaintiff was justified in contracting with the Defendant Company through its Land Commissioner the latter in so contracting doing an act within his apparent authority. It is further submitted that the Plaintiff was entitled in the ordinary course of business to assume that the Land Commissioner was authorized to contract as he did. ⁴⁰

15. It is submitted here that the alleged mistake is not such as will be relieved against—if mistake at all it is the mistake of the Defendant Company alone. And it is submitted that neither the common error of both parties nor the sole error of the Defendant

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ant Company as to the operation and effect of the contract can be ground for resisting specific performance.

16. The learned trial judge in his reasons for judgment holds that there was a mistake on the part of the Land Commissioner in entering into the agreement of sale, using the following language: "There was clearly then a mistake on the part of Mr. Trutch, in entering into an agreement the legal effect of which is so startlingly at variance with his instructions," but it is submitted that the evidence is not such as to affect the Plaintiff with any such mistake.

17. It is submitted that the Defendant Company if not otherwise liable is liable on the ground of ratification of the agreement of sale to the Plaintiff—in the acceptance or acquiescence in and the taking of the benefit of the contract. The learned trial judge has held that there was ratification using the following language in so holding: "In ratifying Mr. Trutch's contract which the Company undoubtedly did (and it must be remembered that their ratification related back to the date of the original contract) they fell into the same mistake as to its legal effect which Trutch did in making it. The ratification can stand on no higher ground than the contract and having occurred under palpable mistake neither is it to be enforced by action for specific performance although such mistake is unconnected with the conduct of the party seeking to enforce the contract and proceeds entirely upon the misconception of the party against whom the contract is sought to be enforced." In finding ratification of the contract it is submitted that the learned trial judge has erred in law by engrafting on it the alleged mistake. And it is submitted that the Defendant Company by ratification are bound by the contract according to its legal effect.

18. It is submitted on the evidence that the Defendant Company is by non-dissent, part performance, ratification, and estoppel precluded from setting up mistake. The evidence shows that the agreement was entered into on the 28th November, 1889, and \$120 was paid on account of the purchase price of the land and the Plaintiff was let into possession and made improvements on the land and the Defendant Company acted throughout under and upon the terms of the said agreement and all dealings were in conformity with and referable to the said agreement only and the Defendant Company accepted the balance of the payments and interest payable according to the terms thereof and on the 8th day of May, 1896, executed a deed in alleged compliance with the said agreement containing the reservations objected to by the Plaintiff (this being the first intimation of any contention on the part of the Defendant Company of any claimed reservations) and which deed was immediately returned to the Defendant Company. And not until the 3rd day of September, 1896, is the money paid by the Plaintiff under the agreement returned to him by cheque, which cheque was immediately returned to the Defendant Company by the Plaintiff.

19. It is submitted upon the facts and circumstances of this case fully brought out in the evidence that it is not a case calling for the interposition of equity, the Defendant Company cannot be said to have mistaken their title, the Defendant Company being the owners in fee simple of the land in question there was the capacity to contract and to sell the whole estate vested in it—and it is not the case of mistake of law arising from the doubtful

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construction of the grant. The agreement of sale is and always has been clear and unambiguous and it cannot be said that there could have reasonably been any doubt or mistake as to its true construction. The learned Trial Judge therefore having found a valid contract and ratification, erred in law in holding that there was any mistake in the contract entered into.

20. It is submitted that in any event the learned Trial Judge erred in law in decreeing that the Plaintiff was only entitled to a conveyance in the terms of the deed as tendered by the Defendant Company to him—in that at most the Defendant Company only 10 contended but failed to prove—that the minerals were reserved, whilst the deed as tendered reserves. (a) The right to the Defendant Company, its successors and assigns to enter upon the land in question and cut and carry away timber for railway purposes without paying compensation therefor. (b) The right to the Defendant Company, its successors and assigns to rights of way for the Railway and the right to enter upon and take such part of the land as may be required for stations and workshops without paying compensation therefor. (c) The right to the Defendant Company; its successors and assigns, to all coal, coal oil, ores, mines, minerals and quarries whatsoever in or under the land with full liberty of ingress, egress and regress with full liberty to sink shafts, etc., erect 20 machinery, etc., open roads, etc., for working and carrying away minerals, etc., and appropriate and use any part of the land for depositing minerals, etc., thereon paying reasonable compensation for such of the surface of the land as might be taken, damaged or destroyed by the said searching, etc.

21. It is submitted that in default of specific performance being decreed the Plaintiff is entitled to damages in the way of full compensation for the loss of his bargain.

Dated this 14th day of December, A D., 1897.

C C. PEMBERTON.

Solicitor for the Plaintiff (Appellant). 30

TO CHAS. E. POOLEY, ESQ.,

Solicitor for the Defendants (Respondents.)

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IN THE SUPREME COURT OF BRITISH COLUMBIA.

IN THE FULL COURT.

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BETWEEN

FRANK VICKER HOBBS,

PLAINTIFF (APPELLANT),

AND

THE ESQUIMALT AND NANAIMO RAILWAY COMPANY,

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DEFENDANTS (RESPONDENTS).

BEFORE THE HONOURABLE JUSTICES WALKEM, DRAKE AND IRVING.

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REASONS FOR JUDGMENT OF JUDGES OF FULL COURT.

DRAKE, J

This is an appeal from the Chief Justice refusing the Plaintiff specific performance on the ground of the mistake of the vendors—the learned Chief Justice finds certain facts which the Appellant does not seek to controvert—the chief finding of importance is that the Defendant Company adopted and ratified the acts of Mr. Trutch, their agent, who⁴⁰ contracted to sell the land in question to the Plaintiff. The mistake alleged is that Mr. Trutch failed to act on the verbal instructions given him by Mr. Dunsmuir, the President of the Company, not to sell the minerals. The Plaintiff states positively that when he paid the first instalment of the purchase money and received the receipt in question no intimation was ever given that the minerals were not intended to pass, and Mr. Trutch says that he made a point of so informing all purchasers, but could not speak as to particularly informing the Plaintiff. It is remarkable that Mr. Trutch did not insert the reservation of the minerals in his receipt of the purchase money as the chief value of these lands

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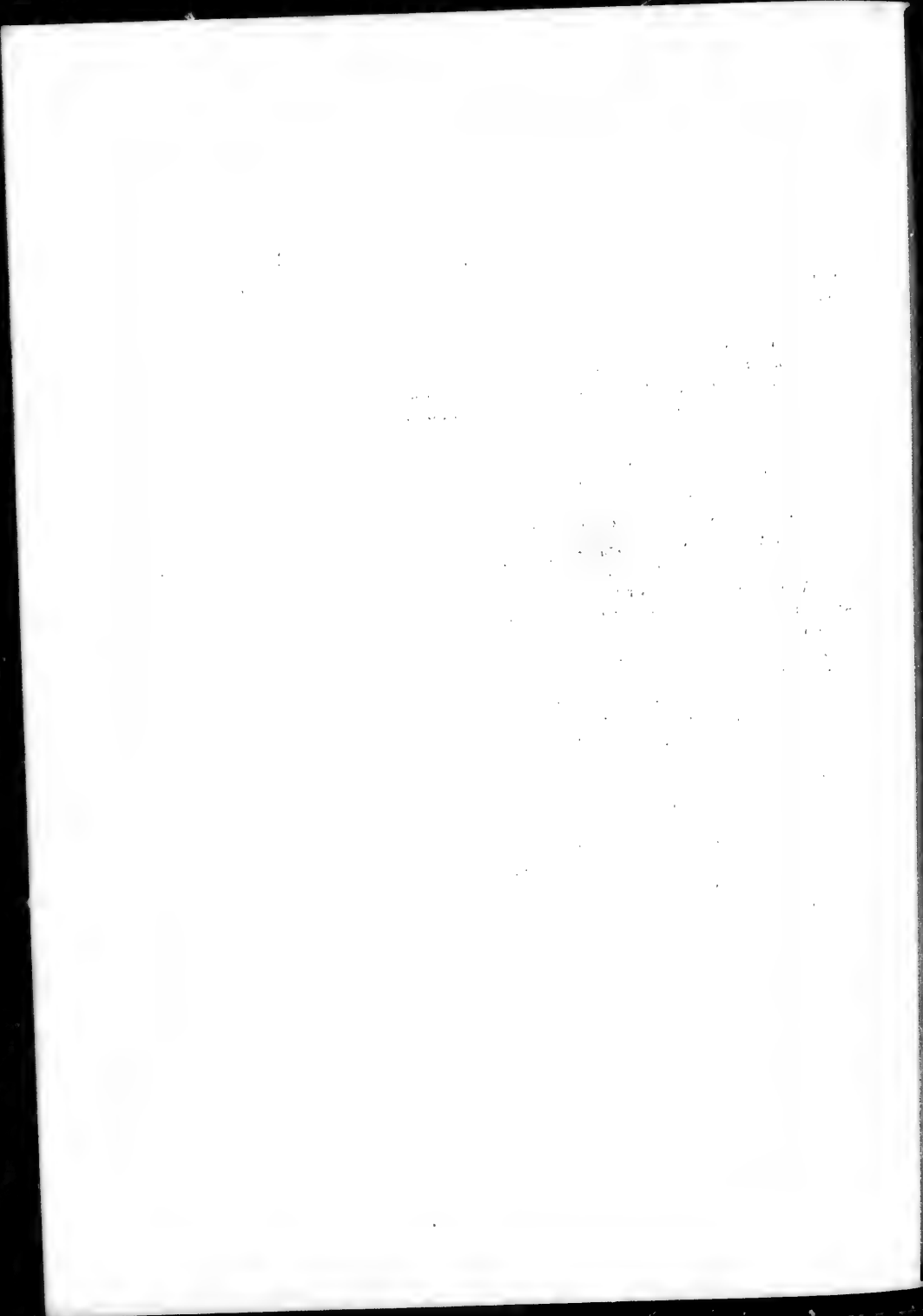
consists in their minerals. The Defendant Company are the freeholders of a very large tract of country, over two million acres, the minerals and timber whereof are their chief, and in most cases their only commercial value.

Mr. Trutch, seems to be under the impression that the use of the term lands merely imported surface rights, but mines and minerals will pass under the term lands. *Shep. Touch 90, Townley vs. Gibson 2 T. R. 701.* However the contract which is evidenced by the receipt Exhibit "C" has, as the Chief Justice has found, been ratified by the Defendant Company, but as I understand the Chief Justice the ratification mentioned was merely of the act of Trutch, in giving the receipt, but not of the omission of Mr. Trutch to inform the Plaintiff, that the surface of the lands was all that was intended to be sold. No intimation was given to the Plaintiff that he was not entitled to a conveyance in fee until he had paid his purchase money and a deed not only reserving the minerals but imposing other onerous burdens on the purchaser was presented.

The Plaintiff was put in possession in 1890 after payment of the first instalment, and built a log house on the property, but has not personally occupied it since. No question is now raised as to the validity of the contract, the main contention being that Mr. Trutch made a mistake, and therefore the Defendants are entitled to a rescission of the contract, and specific performance should not be decreed.

A mistake if mutual is relieved against by the Court so in some cases, is mistake, which is only the mistake of one of the parties to the contract. A mistake has never been defined in a Court of equity; it consists amongst other things in ignorance or forgetfulness, *Kelly vs. Solari 9 M. & W. 54*, of a fact passed as in *Willan vs. Willan 16 Ves. 72* or present *Cocking vs. Pratt 1 Ves. 400*. In 1893 the Defendants gave the Plaintiff notice that his instalments were due, and again in February, 1894, and in March, 1896, he was informed that the Company were prepared to issue a deed to him on payment of the balance due. On 28th April, 1896, the Plaintiff sent to the Defendants a marked cheque for \$499.60, balance due, and on 8th May Defendants enclosed a conveyance dated 1st May purporting to convey to Plaintiff Section 6, Douglas District, containing 160 acres more or less—saving and reserving to the Company the right to enter upon the land and cut and carry away timber for railway purposes without compensation and also reserving rights of way for their railway and the right to take lands for stations and workshops without compensation, and also reserving all minerals with liberty to enter search for and carry away the same and to make pits and erect engines and open roads and appropriate the surface for dumping ground but in such case they were to pay compensation. On 9th May Plaintiff returned the deed claiming that there were no reservations when he made the agreement to buy. The Company kept Plaintiff's cheque until September 3 and then returned it.

The Defendants say that Mr. Trutch made a mistake, if he did not in fact inform the Plaintiff that the minerals did not pass, and acted contrary to his express instructions and that they were under the impression that such instructions had been carried out. This is not a case of mutual mistake, but of an alleged mistake of the vendors, the purchaser in no way induced or contributed to the error, he was paying a slightly higher price for land than was charged by the Provincial Government, which only reserved mines royal and



coal. The Court exercises a jurisdiction to relieve when a mistake is proved, even in cases when it is only on one side. The principle referred to in the argument as laid down in Story's Equity 147, is that a person cannot have relief unless the party benefitted by the mistake is disentitled in equity and conscience from retaining the advantage he has acquired. This broad statement has not been acted on in its entirety in Wycombe Railway Company vs. Donnington Hospital, L. R. 1, Ch. 273, Knight Bruce, L. J., says: "It would be contrary to the rules of this Court to enforce specific performance against a Defendant swearing and proving that his sense and understanding of the agreement in question was different from that of the purchasers"

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Malins vs. Freeman 2, Keen 25, and Manser vs. Back 6, Ha. 443, are also cases of mistake arising from neglect of the principals' orders, although such orders were not communicated to the purchaser, in cases of sale at an inadequate value—the Court has refused to enforce performance, Mortlock vs. Buller 10, Ves. 292. On the other hand Stewart vs. Kennedy 15 A. C. 75, Lord Watson says: "Upon general principles one party can never defend himself against specific performance, by setting up a misunderstanding on his part of the real meaning of the contract, to permit such a defence would destroy the security of contracts and Powell vs. Smith, L. R. 14, Eq. 85, the same doctrine was enunciated and the Master of the Rolls uses this language: "When the defendant by his agent has adopted a certain form of agreement, and then when he finds that it gives certain rights which he did not intend, he wishes to put an end to it but this Court considers that every one entering into such a contract is bound to know what the law is, and as the Defendant entered into it with his eyes open (assuming that he is bound by the acts of his agent) he cannot set it aside because he finds the construction of it is against him;" and again in Barrow vs. Isaac & Son, L. R. 1, Q.B. (1891) 417, the Court held that the mistake of the Solicitor in not ascertaining what his client's real position was by examination of the documents in his possession was not such a mistake that equity would relieve against, but none of the Judges denied that the Court had jurisdiction to relieve if they thought fit to exercise their discretion. The general result of the cases is that the Court has jurisdiction in any case of mistake which has been proved, to exercise their discretion and grant equitable relief, and taking all the circumstances into consideration I see no reason to differ from the Chief Justice in his view that specific performance should not be decreed but I think his judgment should be varied on other points, viz:

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The reservations contained in the deed other than the right to minerals are not alluded to in the evidence and there is no evidence that these reservations were part of the instructions given to Mr. Trutch by Mr. Dunsmuir. If then the Plaintiff is willing to accept a deed simply reserving the minerals the action will be dismissed without costs. As the Plaintiff never amended his claim by an alternative claim for damages and asked for no amendment at the trial he cannot get his costs in the Court below, see Hipgrave vs. Case, 28, C. D., 356. I think there should be no costs of this appeal.

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WALKER, J.: I concur.

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IRVING, J.

The material facts in this case are as follows:

The Plaintiff on the 28th day of November, 1889, then being unaware that the Defendant Company were selling their lands subject to a reservation of mines and minerals, called on Mr. John Trutch, at that time the Company's Land Commissioner, and after some conversation, handed Mr. Trutch a document, Exhibit B, which is as follows: "The description of a piece of land I wish to pre-empt or purchase" (then follows the description and the Plaintiff's signature). Mr. Trutch issued to him the document, Exhibit C. 10

ESQUIMALT & NANAIMO RY. CO.—LAND DEPARTMENT.

VICTORIA, B. C., Nov. 26, 1889

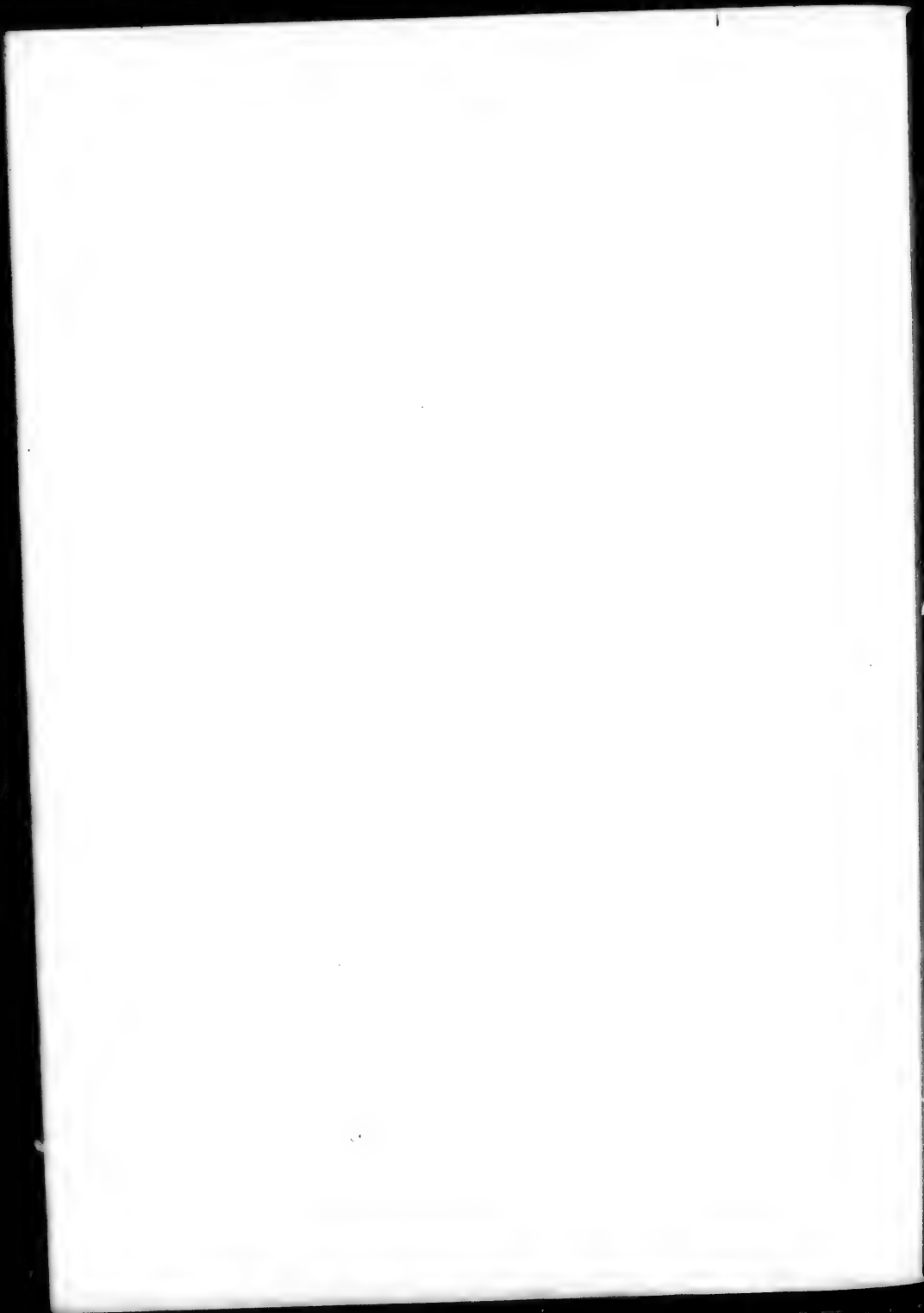
Received of Frank Vicker Hobbs the sum of one hundred and twenty dollars (\$120), being a first payment on account of his purchase from the E. & N. Railway Company of one hundred and sixty (160) acres of land in Bright District at the price of three dollars (\$3) an acre. (Here follows description) the balance of purchase money to be paid in three equal instalments of seventy-five (75) cents an acre at the expiration of one two and 20 three years from date, with interest at the rate of 6 per cent. per annum.

(Sd.) JOHN TRUTCH,
Land Commissioner.

Plaintiff paid his money, entered into possession, and after a slight dispute with the Company as to being allowed to complete his purchase, received a letter (2nd of March, 1896), from Mr. Solly, the then Land Commissioner, informing him that the Company would issue to him (the Plaintiff) conveyance of the land that he had agreed to purchase, providing the Plaintiff had the land surveyed, and paid up the instalments in arrears, with 30 interest.

All these things the Plaintiff did; and the Company sent him a conveyance drawn in the form usually adopted by the Company. This was a conveyance of the surface only; the mines and minerals were reserved, and there were also other very extensive reservations in favor of the Company, e. g., of rights of way, the right to cut timber, to sink shafts and to work the mines. These reservations are hereafter referred to as surface reservations. The Plaintiff at once, 9th May, 1896, returned this document to the Company in a letter, in which he stated that the deed was not acceptable, "being full of reservations,"—but not specifying whether the reservations objected to were the mines and minerals, or 40 merely the surface reservations. Matters remained in abeyance until the 3rd September, 1896, when the Company sent to the Plaintiff a cheque for \$619 60, being, as stated in the covering letter (Exhibit V), the refund of all moneys paid by the Plaintiff on the purchase of Lot 6, the conveyance for which he, the Plaintiff, had refused to accept from the Company.

On the 23rd December, 1896, the Plaintiff tendered to the Company for execution a deed to himself of the land, without any reservations (Exhibit X), other than the reservations, etc., expressed in the original grant from the Crown, the deed which he considered



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he was entitled to under *Bower vs. Cooper*, 2 Hare, 408; and on the Company refusing to execute this deed, brought this action for specific performance, and for an injunction restraining the Company from mining for coal, coal having been discovered in or under the land in question, in August, 1895.

At the trial which was had before the Chief Justice without a jury, the Plaintiff said: "When I bought I set quite a value on the timber which was on the land. I had no idea but what I was entitled to all the timber, and to all that was under the land. I had no idea of any reservations at all; they were not notified to me at any time; nothing called my attention to reservations; and at the time of the getting of the agreement there were no reservations mentioned, shown, or spoken to me, and I had no knowledge of any reservations, as I had only lately arrived in the country; I knew nothing about the Company's lands, or any reservations." (page 26.) The Plaintiff was cross-examined, but for the purposes of my judgment I accept his statement. 10

For the defence, evidence was given that Mr. Trutch's authority was limited to the sale of surface rights only. "(Q) What were the instructions that were given to you by Mr. Dunsmuir when you were appointed? (This was the late Mr. Robert Dunsmuir, the President of the Defendant Company.) (A.) To sell the land for \$3 an acre, reserving all minerals and coal. (Q.) Was that the only authority to deal with the railway lands? (A.) That was the only authority I had. (Q.) Have you always acted upon that authority? (A.) Always." 20

He always used a form on conveyance to purchasers similar to that sent to the Plaintiff in this case; he, in fact, never used any other, he had never sold the coal or minerals during his term of office; (page 102), he usually told people that he sold the surface only; that was his general custom, but he could not say that he had so told this particular Plaintiff. (page 105.) 30

The vice-president of the Company, Mr. James Dunsmuir, said at (pages 131 and 132); that he was one of the directors of the Company in 1889; that his instructions to the Land Commissioner (Mr. Trutch), were to sell the land and reserve all minerals; that no minerals had been sold by the Commissioner at any time; that the only sale of minerals ever made by the Company had been sold to the late Robert Dunsmuir, the President of the Company, and the sale in that case was not made by the Land Commissioner, but under a resolution passed at a general meeting of the Company.

And again at page 132, in cross-examination to Mr. McPhillips: (Q.) You say your instructions were to him (Mr. Trutch), that he was only to sell the surface, not the minerals? (A.) Not the minerals; sell the land, but not the minerals. (Q.) Sell the land in question, but not the minerals? (A.) Yes. (Q.) These instructions were verbal, were they not? (A.) Verbal, yes. (Q.) You did not have those instructions formulated in any way, and printed and posted up in the office, or anything of that kind? (A.) Not necessary, no." 40

There is more evidence to the same effect. (pages 96 and 135.) The learned Chief Justice found with reference to this part of the case as follows:

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(Page 169.) The evidence is clear and uncontradicted that Mr. Trutch's duties, as Commissioner, were limited to the disposal of surface rights according to the printed form of conveyance in use by the Company, which form has never been deviated from, and both Mr. Trutch and Mr. Dunsmuir swore that there was no idea in the Plaintiff's case of parting with anything except surface rights. And he proceeds: "There was clearly, then, a mistake on the part of Mr. Trutch, in entering into an agreement, the legal effect of which is so startlingly at variance with his instructions."

The Chief Justice refused specific performance on the ground of mistake. But he thought that although the mistake shielded the Defendants from specific performance, it¹⁰ did not disturb the validity of the contract. He therefore made the decree refusing specific performance as claimed by the Plaintiff, but declaring that the Plaintiff was entitled (a) to a conveyance containing reservations of the minerals and other usual surface reservations imposed by the Company, or (b) a return of all moneys paid; with interest, plus compensation for improvements, etc.—modelling his decree somewhat after the decree pronounced in *Bloomer vs. Spittle*, Law Reps., 13 Eq., 427.

The Plaintiff being dissatisfied appealed.

The first point to be decided is, upon what evidence are we to base our judgment?²⁰ At the trial the Plaintiff's counsel objected to the reception of, or to the giving of effect to, any evidence of what he called "secret instructions" given to Mr. Trutch, unless it were shown that his client was aware of the nature of these instructions (page 101). His contention before us was that the evidence of these instructions to Mr. Trutch was not admissible and that if this evidence were eliminated there would be no evidence of mistake. The case of *Chinnock vs. Ely* (1865) 4 De G. J. & S., 638, cited by the learned Chief Justice in dealing with the question of admissibility of evidence of the instructions given to the agent seems to have been misunderstood by the Plaintiff's Counsel. In that case there were two distinct points. The first was as to the construction to be placed on a letter written by the Defendants' Solicitors: "We are instructed to proceed with the sale to you of these premises, a draft contract is being prepared and will be forwarded."³⁰

It was to this stipulation for a formal contract that the cases of *Rossiter vs. Miller*, L. R. 3 App. Cas. 1124, and *Winn vs. Bull*, L. R. 7, Ch. D. 29, cited before us, referred.

The other part of the case was this, the Marchioness had purchased a house under such very special conditions of sale that it was impossible for her to sell again with safety unless she sold subject to the same or similar stipulations under which she had purchased, accordingly when she became desirous of selling she instructed her Solicitors, Messrs. Lethbridge & Mackrell, to sell the same for £10,000, subject to the same stipulations and con-⁴⁰ditions under which she had purchased the same.

The giving of these instructions to Messrs. Lethbridge & Mackrell, and the admission thereof as evidence to resist specific performance, were the points which the learned Chief Justice had in his mind when he cited this case, and I think with him that *Chinnock vs. Ely* at once disposes of Plaintiff's objection to the reception of evidence of this character.

The question of admissibility of this evidence is very fully covered in the cases cited in the notes to Section 1140 of *Taylor on Evidence*, 9th edition.

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If any later authority is necessary to dispose of this question it can be found in *Wilding vs. Sanderson* (1897) 2 Ch. 534, where on an application to set aside a consent order on the ground of mistake of the Plaintiff's counsel, Byrne, J., gave effect to the evidence of the Managing Clerk who had instructed counsel, to the evidence of counsel and of the Plaintiff.

The evidence shows clearly that the Company never contemplated a sale of minerals, and in my opinion sufficient evidence was adduced to justify the conclusion arrived at by the learned Chief Justice that Mr. Trutch never contemplated that he was selling or agreeing to sell anything but the surface and that subject to the surface reservations, page 102.¹⁰ But as in my view of the case it is unimportant to decide whether the finding of the Chief Justice as to surface reservations was sustained by the evidence or not, I shall not follow up the subject of surface reservations any further.

From my point of view it is only necessary to arrive at the conclusion that Mr. Trutch in dealing with the Plaintiff was addressing his mind to the sale of the surface only—and not to the minerals thereunder.

Evidence of the Defendant's instructions being admitted, it is established (we are all agreed upon this) that Mr. Trutch upon the one hand was not authorized, and that he²⁰ never could have intended to enter into any contract for the sale of land *a caelo usque ad centrum*.

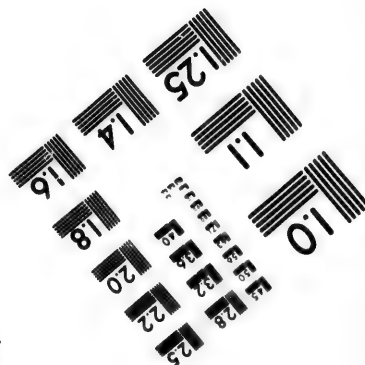
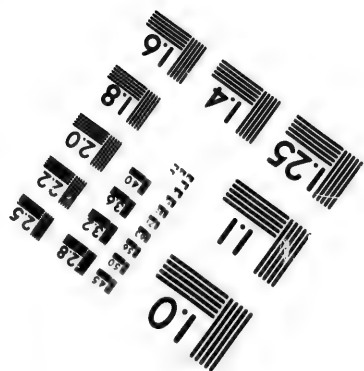
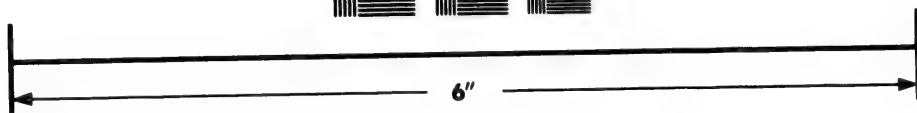
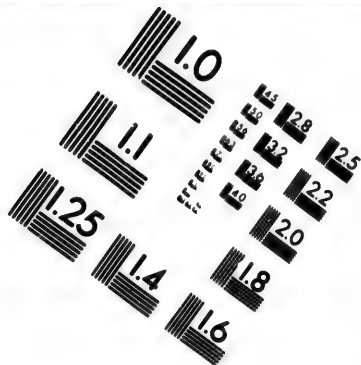
The Plaintiff, on the other hand, was bargaining (see page 26 of Appeal Book) "for the land and all that was on it and under it."

In the case of *McDonell vs. McDonell* (1874) 21 Grant 342—an action for specific performance resisted on the ground of mistake—Blake V. C. at page 345 points out that the difficulty in these cases is not to apply the law pertinent to them, but to ascertain whether as a matter of fact a misapprehension did exist in the mind of the Defendant under which he entered into an agreement which would not have been otherwise concluded³⁰ by him; and that the utmost caution must be exercised in distinguishing between a case where an actual misunderstanding or misapprehension does exist, and one where the Defendant simply rueing his bargain seeks to prevent a decree for the performance of the contract being pronounced against him—I am fully sensible of the wisdom of those remarks and after giving them due weight have arrived at the conclusion that there was here an actual misunderstanding or misapprehension on the part of Mr. Trutch as to the nature of the estate he was agreeing to sell.

How the misunderstanding of the word "land" arose, can easily be understood in⁴⁰ this country where land is frequently granted without the minerals or timber, and it is worth noticing that notwithstanding the Plaintiff has—to the knowledge of the Defendants see page 142—brought this action based on the misuse of that word, the word was used at the trial, again and again, by the Defendant's officers in its limited sense.

Where the Court is satisfied that such an actual misunderstanding or misapprehension exists it is against conscience for a Court of Equity to aid the Plaintiff, by enforcing specific performance—see *Wycombe Railway Co. vs. Donnington*, L. R. 1, Ch. 268. and other cases cited by Blake V. C. in *McDonell vs. McDonell*.





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See also *Omnium Securities Co. vs. Richardson* (1884) 7 Ont. 182 where specific performance of a contract was refused as the parties differed in their understanding of it, and Fry on specific performance Sec. 752, Edition of 1802.

In *Paget vs. Marshall* (1885) L.R. 28 Ch. Div. 255, we find a unilateral mistake is stated to be a mistake of this kind, i.e., where the true intention of one of the parties is to do one thing and he by mistake has signed an agreement to do another—in such a case the agreement will not be enforced against him, but the parties will be restored to their original position and the agreement will be treated as if it had never been entered into.

From the same case a definition of a common mistake can be gathered, i. e., where two persons have really agreed to one and the same thing (that is they are *ad idem*), but in endeavoring to set down their agreement in writing have set down another thing, and executed the agreement on that wrong footing, that is a common mistake and the Court will in such a case rectify the deed.

In my opinion the mistake in this agreement falls within the class called unilateral mistake and the only part of the judgment appealed from in which I do not agree with, is that portion which gave the Plaintiff an option to take a conveyance as if the agreement had been rectified.

In *Hickman vs. Berens* (1895), 2 Ch. 638, we have an instance of mistake. There the mistake was that of Counsel consenting to a compromise, but it seems to me in ascertaining the principle upon which the Court should now proceed, it makes no difference whether the mistake was of Counsel or of any other kind of agent. There as here, the written agreement contained all that one party to the action desired.

As the judgment of Rigby L.J., so accurately and so concisely expresses my views of this case, I adapt his language to the action before us. If this were an attempt to get rid of a sale because it turned out to be onerous to the Defendant, I think it ought not to be entertained, or at any rate it ought not to succeed. But I do not look at the case in that light at all. I consider that the Defendant's agent, in signing the document of 28th November, 1889, had not present to his mind that it was intended to cover the sale of land *usque ad centrum*, but that he thought and intended to deal with the land in the limited sense used in the Land Department of the Company.

If that was the real state of his mind—and I am satisfied that it was—then the agreement was thought by the Plaintiff to be more extensive than the Defendants intended it to be, that is to say they were not agreed upon the subject matter.

In that case I conceive it is right, that the agreement of 28th November, 1889, 40 should be dealt with as if it never existed.

In my opinion there can be no rectification of this agreement, and the course pursued in *Olley vs. Fisher* 34 Ch. D. 367, is not applicable.

For the above reasons I think the decree pronounced by the learned Chief Justice gave the Plaintiff more than he was entitled to.

Mr. McPhillips wanted us to decide this case upon the line of law adopted by Lord Romilly in *Powell vs. Smith* (1872), L. R. 14 Eq. 85—viz., that it is not a question of

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mistake, but a question upon the construction of the agreement, agreed to by everybody concerned. But that is not the whole question, there is something back of that. a mistake as to the meaning of the words used, may be accompanied by another mistake, i. e., a fundamental mistake as to the subject matter dealt with by the contract.

The Defendants to an action for specific performance might set up two defences:

1. That the words of the agreement would not bear the meaning contended for.
2. Even if it were held that the words bore the meaning for which the Plaintiff contended, then in that case the Defendant never addressed his mind to the subject matter the Plaintiff had in contemplation. The two actions out of which the appeals (*Stewart vs. Kennedy*) arose, illustrate what I have in my mind, viz., the difference between (a) a mistake between the words used in drawing up the agreement and (b) a mistake as to the subject matter of the contract.

Hickman vs. Berens, already mentioned, is another instance. That was an application for relief on the ground of mistake, and, as explained, in *Wilding vs. Sanderson* (1897), 2 Ch. 534, there was the two-fold mistake I have mentioned; a mistake as to the meaning of the words used, accompanied by another mistake as to the subject matter dealt with by the contract.

As I have said, Mr. McPhillips wants us to decide this case on the construction of the Exhibits, that is he wants to confine us to the first of the two defences I have alluded to. Should we select his point of view we would shut out the second defence which, according to my opinion, is the real ground of defence, namely, that there never was an agreement in respect of the subject matter with which they were dealing. Mr. Trutch could not sell the land (in the full legal sense of that word)—the Defendant wanted that and nothing else. There being no agreement on this fundamental point, there was no contract—there can be no contract unless the parties are *ad idem*. I rest my judgment on the single point, that the parties were never *ad idem*, and on the principles enunciated in *Wilding vs. Sanderson* (1897) 2 Ch. 534, *Hickman vs. Berens* (1895), 2 Ch. 638; and *McDonell vs. McDonell*, 21 Grant 342.

Specific performance being impossible (in this case, by reason of the absence of consensus), there can be no damages. Compare in re *Northumberland Avenue Hotel Company* (1886), 33 Ch. Div. 16, and *Lavery vs. Pursell* (1888), 39 Ch. Div. 508. All we can do is to see that the parties are restored to their original position, as if the agreement had never been entered into. Unless, of course, the Defendant consents to a rectification. See *Paget vs. Marshall* (1885), 28 Ch. D. 255.

As to the so-called ratification by the Company, the acts of the Defendants constituting the so-called ratification were acts proceeding on the erroneous assumption that they, the Defendants, had, in fact, made a contract with the Plaintiff, and can stand on no higher ground than the original agreement. See *Dibbins vs. Dibbins* (1896), 2 Ch. 348; *Marsh vs. Joseph* (1897), 1 Ch. 246, and in re *Northumberland Avenue Hotel Company*, L.R. 33, Ch. D. 16.

As to the Defendant's laches, Mr. McPhillips contends that as the Plaintiffs returned the Company's deed on the 9th May, 1896, as not acceptable to him, and that as the

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Company retained the purchase money until the 9th September, 1896, the Company thereby lost its right to set up this defence. In considering this point there are two circumstances to be regarded, the length of the delay and the nature of the acts done during the interval which might affect either party, and cause a balance of justice or injustice in taking one course or the other so far as it relates to remedy. See *Rouchefoucauld vs. Boustead* (1897), 1 Ch. 211.

It is not only time, but the conduct of the parties to be considered, and as there is nothing to show that the Plaintiff's position was in any way altered, I do not think the holding by the Defendants of the purchase money for four months should deprive them of this defence.

The delay of four months is easy to account for, when we remember that the Plaintiff's Solicitor, did not in the correspondence call the Company's attention to the fact that the Plaintiff claimed the minerals, but merely objected to the "reservations." The Company's officers, according to my view of the case, would regard as objections to surface reservations.

In my opinion the judgment appealed from should be varied by striking out that portion under which the Plaintiff is entitled to an option to a conveyance of the land subject to minerals and surface reservations.

But I do not think that the Plaintiff, because he has succeeded in showing that the judgment gave him something more than he is entitled to, ought to have the costs of this appeal.

ORDER FOR JUDGMENT OF FULL COURT.

Thursday, the 10th day of March, 1898. 30

Upon motion by way of appeal on the 18th and 19th days of January, 1898, made unto this Court by counsel for the plaintiff (appellant) from a decree in this action dated the 19th day of June, 1897, and upon hearing Mr. A. E. McPhillips of counsel for the plaintiff (appellant) and Mr. C. E. Pooley, Q. C., of counsel for the defendants (respondents), and upon reading the appeal book herein, THIS COURT DID ORDER that the said appeal should stand for judgment and the same standing this day for judgment in the presence of counsel on both sides THIS COURT DOTH ORDER that the said decree dated the 19th day of June, 1897, be varied by striking out therefrom so much thereof as directs "that the plaintiff shall be entitled to receive at his option the conveyance of lot 6, 40 Douglas District, as tendered by the defendants to the plaintiff as set out in paragraph 8 of the plaintiff's statement of claim in which case this action shall be dismissed without costs." AND IT IS ORDERED that instead thereof "that the plaintiff shall be entitled to receive at his option a conveyance in fee simple in possession free from incumbrances of ALL that parcel of land more particularly described as follows: All that piece or parcel of land situated in the District of Douglas, Vancouver's Island, in the Province of British Columbia, and upon the official map of the said District known and numbered as Lot 6, Douglas District aforesaid, and which said piece or parcel of land is said to contain one

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hundred and sixty acres, more or less, with an exception and reservation to the defendants and their assigns of all coal, coal oil, ores, mines, minerals, and quarries whatsoever, in or under the land thereby granted or expressed so to be, with full liberty of ingress, egress and regress at all time for the said Company, their successors and assigns, and their servants, agents, and workmen, in, to and upon the said land, and either with or without railways, horses, or other cattle, carts and wagons and other carriages, for the purpose of searching for, working, getting and carrying away the said coal, coal oil, ores, mines, minerals and quarries, and with full liberty also for the said Company, and their assigns, and their servants, agents and workmen to sink, drive, make and use pits, shafts, drifts, 10 adits, courses and water courses, and to erect, and set up fire and other engines, machinery and works, and to open roads in, upon, under and over the said land, or any part or parts thereof for the purposes of more conveniently working and carrying away the said minerals and produce of the mines and quarries, and the Company, or their assigns, paying reasonable compensation for such of the surface of the said land as may be taken, damaged or injuriously affected by the works aforesaid, or any of them in which case the action is to stand dismissed without costs." AND IT IS ORDERED that with this variation the said decree dated the 19th day of June, 1897, be affirmed: AND IT IS 20 FURTHER ORDERED that there be no costs of this appeal to either party.

By the Court,

[L. S.]

(Sgd.) B. H. TYRWHITT DRAKE,

Registrar.

NOTICE OF APPEAL TO SUPREME COURT OF CANADA.

Take notice that Frank Vicker Hobbs, the above named Plaintiff, hereby appeals to the Supreme Court of Canada from the Judgment pronounced in this cause by this 30 Court, sitting as a Full Court, on the 10th day of March, 1898.

Dated this 28th day of March, 1898.

C. C. PEMBERTON,

Plaintiff's (Appellant's) Solicitor.

To C. E. POOLEY, ESQ.,

Defendants' (Respondents') Solicitor.

BOND FOR SECURITY FOR COSTS.

Know all Men by these Presents, that we, Frank Vicker Hobbs, of the City of Victoria, in the Province of British Columbia, Furniture Dealer; Edwin Hobbs, of the said City of Victoria, Rancher; and Thomas Kidd, of Lulu Island, in the said Province, Member of the Provincial Parliament, are jointly and severally held and firmly bound unto the Esquimalt & Nanaimo Railway Company in the penal sum of \$500.00, for which payment well and truly be made we bind ourselves and each of us by himself, our and each of our heirs, executors and administrators firmly by these presents. 40

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Dated this 15th day of April, A. D. 1898.

Whereas a certain action was brought in the Supreme Court of British Columbia by the said Frank Vicker Hobbs, Plaintiff, against the said The Esquimalt & Nanaimo Railway Company, Defendants. And whereas Judgment was given in the said Court, against the said Frank Vicker Hobbs, who appealed from the said Judgment to the Full Court, being the Court of Appeal for British Columbia.

And whereas Judgment was given in the said action in the said last mentioned Court on the 10th day of March, A. D. 1898.

And whereas the said Frank Vicker Hobbs complains that in giving the last mentioned Judgment in the said action upon the said appeal manifest error hath intervened wherefore the said Frank Vicker Hobbs desires to appeal from the said Judgment of the Full Court of British Columbia to the Supreme Court of Canada.

Now the condition of this obligation is such, that if the said Frank Vicker Hobbs shall effectually prosecute his said appeal and pay such costs and damages as may be awarded against him by the Supreme Court of Canada, then this obligation shall be void, otherwise to remain in full force and effect

(Sgd.) FRANK V. HOBBS. [L. S.]

(Sgd.) EDWIN HOBBS. [L. S.]

(Sgd.) THOMAS KIDD. [L. S.]

Signed, sealed and delivered in the presence of

ALFRED C. ANDERSON,

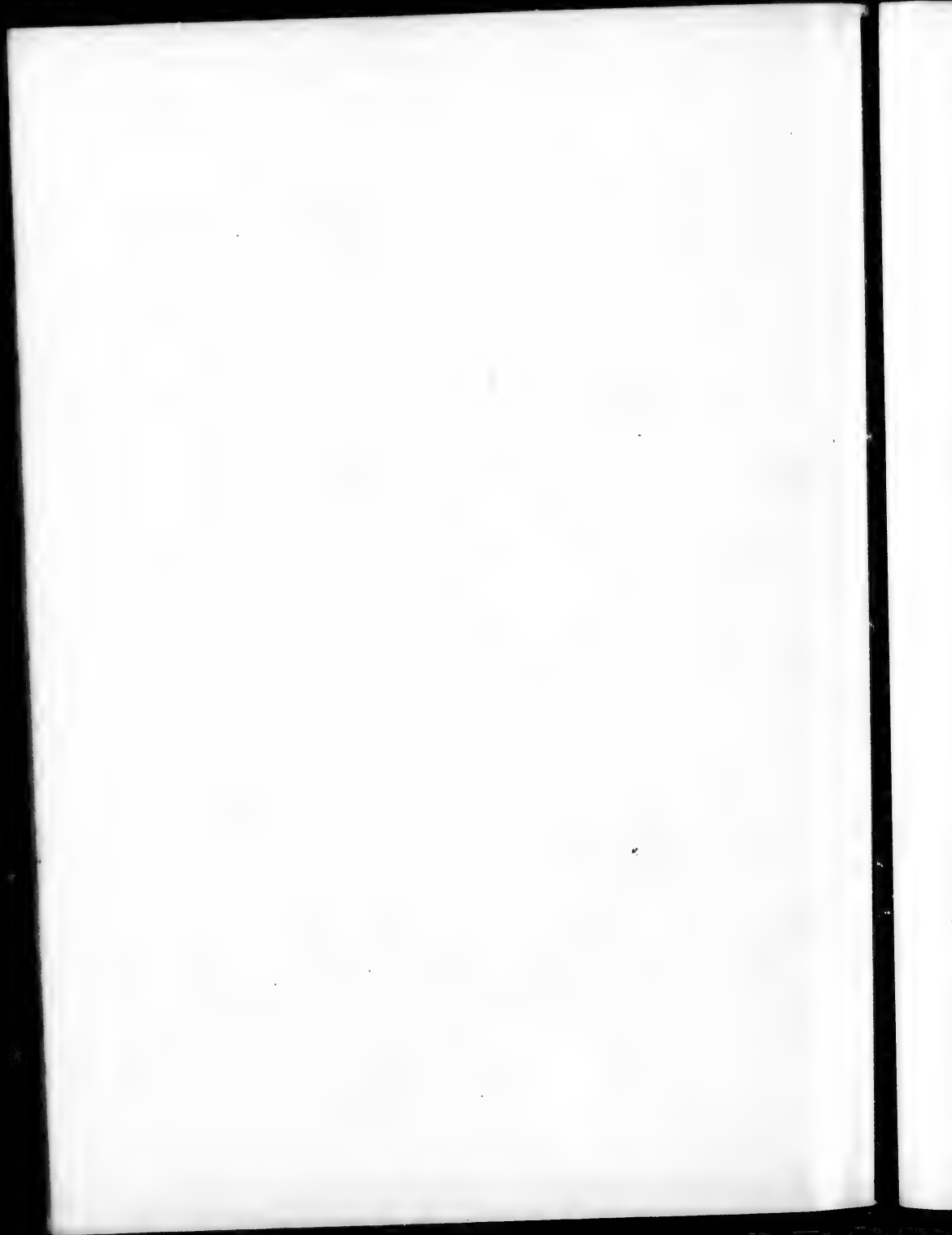
Student at Law, Victoria, B. C.

ORDER APPROVING SECURITY AND ALLOWING APPEAL.

FRIDAY, the 6th day of May, A. D. 1898.

Upon the application of the Plaintiff, and upon hearing the Solicitors for the Plaintiff and Defendants respectively, and upon reading the notice of appeal to the Supreme Court of Canada, dated the 28th day of March, 1898, and the bond, dated the 15th day of April, 1898, and filed herein on the 3rd day of May, by the Plaintiff, as security for the Defendants' cost of appeal to the Supreme Court of Canada, and the affidavits of justification of Edwin Hobbs and Thomas Kidd, the sureties in the said bond mentioned, sworn on the 15th day of April, 1898, and duly filed.

It is ordered that the case on appeal to the Supreme Court of Canada contain the following matter, namely: A true copy of everything contained in the Appeal Book used on the appeal of the Plaintiff to the Full Court, and true copies of the reasons for Judgment of the several Judges who rendered Judgments in the Full Court herein, the order of the Full Court, dated the 10th day of March, 1898, the notice of appeal to the Supreme Court of Canada, dated the 28th day of March, 1898, bond for security of costs filed herein, dated the 15th day of April, 1898, and this order settling case, approving security and allowing appeal.



And it is further ordered that the said bond be deemed good and sufficient security for the Defendants' costs of appeal to the Supreme Court of Canada, and the said appeal be allowed.

M. W. TYRWHITT DRAKE, J.

ORDER EXTENDING TIME TO FILE CASE ON APPEAL.

IN THE SUPREME COURT OF CANADA.

THURSDAY, THE 2ND DAY OF JUNE, 1898.

BEFORE THE REGISTRAR, IN CHAMBERS

(STYLE OF CAUSE.)

Upon the application of the Appellant and upon reading the consent of the Respondents' Solicitors, and the affidavit of Chartres Cecil Pemberton, filed herein this day.

It is ordered that the time for filing the Case in Appeal be extended up to and inclusive of the fifth day of July, 1898.

C. H. MASTERS,

Ent'd Fol. 499, No. 2, J. L.

Acting Registrar.

ORDER FURTHER EXTENDING TIME TO FILE CASE ON APPEAL. 30

IN THE SUPREME COURT OF CANADA.

THURSDAY, THE 30TH DAY OF JUNE, A. D. 1898.

BEFORE THE HONOURABLE MR. JUSTICE TASCHEREAU, IN CHAMBERS.

(STYLE OF CAUSE.)

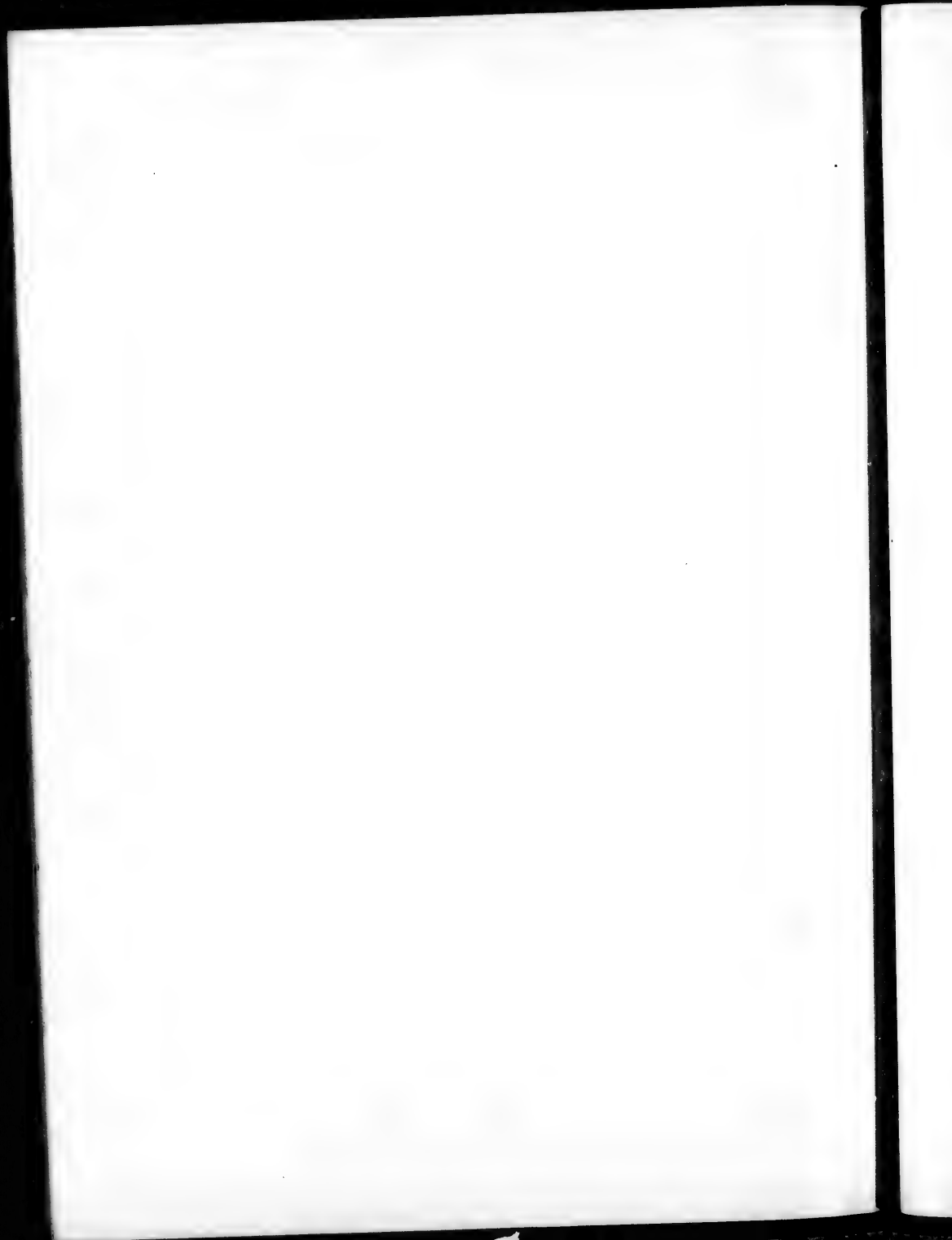
Upon the application of the Appellant and upon reading the consent of the Agents for the Respondents, and upon hearing Counsel for the Appellant.

It is ordered that the time for filing the Case in Appeal herein, be extended up to and inclusive of the twentieth day of July, 1898.

H. E. TASCHEREAU,

Ent'd No. 3, Fol. 4, J. L.

J. S. C.



Exhibits Produced at Trial.

EXHIBIT "A."

FACTS ADMITTED BY THE DEFENDANTS.

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The Defendants in this cause for the purpose of this cause only, hereby admit the several facts respectively hereunder specified, subject to the qualifications or limitations, if any, hereunder specified, saving all just exceptions to the admissibility of such facts, or any of them, as evidence in this cause; provided that this admission is made for the purpose of this action only, and is not an admission to be used against the Defendants on any other occasion, or by any one other than the Plaintiff.

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FACTS ADMITTED.

1. That the Defendant Company are carrying on mining operations in the neighbourhood of the lands claimed by the Plaintiff.
2. That the Defendant Company have run a tunnel under the said lands.
3. That the Defendant Company is mining for coal under the said lands.

Delivered this 11th day of June, 1897. by

CHARLES E. POOLEY,

Of the firm of Davie Pooley & Luxton,

Solicitors for the Defendants.

30

To C. C. PEMBERTON, ESQ.,

Solicitor for the Plaintiff.

EXHIBIT "B."

(Referred to as Exhibit "A" in Examination Evidence Before Trial.)

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DESCRIPTION OF LAND OF PLAINTIFF.

28th November, 1889.

The description of a piece of land I wish to pre-empt or purchase:

A piece of dry land and swamp situated in or about two miles west of Stark's place, Harewood Lake, Cranberry District, commencing at the top of a ridge, running west to

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Berkeley's Creek, thence south down Berkeley's Creek to a corner post at a swamp, then east, then north to the top of the ridge at the place of commencement.

It is on or about two miles west of Lower Hayward Lake and about a mile or a mile and a half or two miles from Donahue's claim, and contains on or about 160 acres, it was formerly claimed by Mr. Stamp.

(Sgd.) FRANK VICKER HOBBS.

EXHIBIT "C."

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(Referred to as Exhibit "B" in Examination Evidence Before Trial.)

AGREEMENT BETWEEN PLAINTIFF AND DEFENDANTS ON 28TH
NOVEMBER, 1889.

ESQUIMALT & NANAIMO RAILWAY CO.—LAND DEPARTMENT.

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VICTORIA, B. C., November 28th, 1889.

Received of Frank Vicker Hobbs the sum of one hundred and twenty dollars (\$120.00), being a first payment on account of his purchase from the E. & N. Ry. Company of one hundred and sixty (160) acres of land in Bright District, at the price of three dollars (\$3.00) an acre. Commencing at a point about two (2) miles west of Louis Stark's Crown Grant in Cranberry District, thence running west 40 chains to Berkeley Creek, thence south 40 chains, thence east 40 chains, thence north 40 chains to place of commencement; the balance of purchase money to be paid in three equal instalments of seventy-five (75) cents an acre at the expiration of one, two and three years from date, 30

withinterest at the rate of 6 per cent. per annum.

(Sgd.) JOHN TRUTCH,

Land Comm'r.

EXHIBIT "D."

(Referred to as Exhibit "C" in Examination Evidence Before Trial.)

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LETTER FROM PLAINTIFF TO DEFENDANTS, DATED 4TH APRIL, 1892.

NANAIMO, B. C., 4th April, 1892.

TO THE E. & N. RAILWAY CO.'S LAND AGENT:

DEAR SIR:—As I am about to survey the piece of land recorded by me on the 28th November, 1889, I wish to know who is your surveyor in this district. I am all alone out

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in that part and I do not know where the nearest corner post is, it is certainly a very long way from my claim and I can only survey from my post, about two miles from Louis Stark's Crown Grant; I have already paid \$120.00 on it and I am anxious to survey and complete the purchase, so an early reply would greatly oblige.

Yours faithfully,

(Sgd.) FRANK VICKER HOBBS,

Saw Mill, Nanaimo,* B. C.

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EXHIBIT "E."

(Referred to as Exhibit "D" in Examination Evidence Before Trial.)

LETTER FROM T. S. GORE TO PLAINTIFF, DATED 6TH APRIL, 1892.

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ESQUIMALT & NANAIMO RAILWAY CO.—LAND DEPARTMENT.

VICTORIA, B. C., 6th April, 1892.

MR. FRANK VICKER HOBBS, NANAIMO:

DEAR SIR:—I beg to acknowledge the receipt of your letter, dated the 4th inst., in reference to your purchase of land in Douglas District.

In reply I would say that you can employ any Provincial Land Surveyor you wish, probably Mr. Fry, of Duncan's, or Mr. Priest, of Nanaimo, would be the best.

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As near as I can tell from your description of the location of the land in question, the portion coloured red on the enclosed tracing, will include what you describe in your application.

In any case the survey will have to be made in such a way as to leave no fractional portions of land between yours and other claims in the neighbourhood.

Yours truly,

(Sgd.) T. S. GORE,

Land Comm'r.

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EXHIBIT "F."

(Referred to as Exhibit "E" in Examination Evidence Before Trial.)

PLAN ENCLOSED IN LETTER FROM T. S. GORE TO PLAINTIFF.

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EXHIBIT "G."

(Referred to as Exhibit "G" in Examination Evidence before Trial.)

NOTICE OF INSTALMENTS FROM T. S. GORE TO PLAINTIFF, DATED
JUNE, 1893.ESQUIMALT & NANAIMO RAILWAY COMPANY—LAND DEPARTMENT.
VICTORIA, B. C., June, 1893. 10

NOTICE.

SIR:—The second, third and fourth instalments, together with interest amounting to \$424.80 is due upon your purchase from the Esquimalt & Nanaimo Railway Company of Lot 6, Bright Dist.

You are requested to forward the above amount to this office without delay.

Instalments	\$360 00
Three years' interest	64 80 20
	\$424 80

I am, Sir,

Your obedient servant,

(Sgd.) T. S. GORE,

Land Commissioner.

MR. FRANK VICKER HOBBS,

Bright District —Victoria.

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EXHIBIT "H."

(Referred to as Exhibit "H" in Examination Evidence before Trial.)

NOTICE OF INSTALMENTS FROM T. S. GORE TO PLAINTIFF, DATED
15TH FEBRUARY, 1894. 40

ESQUIMALT & NANAIMO RAILWAY CO.—LAND DEPARTMENT.

VICTORIA, B. C., February, 15th, 1894.

NOTICE.

SIR:—All the instalments together with interest amounting to \$446.40 are due upon your purchase from the Esquimalt & Nanaimo Railway Company of Lot 6, Bright Dist.

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You are requested to forward the above amount to this office without delay.

I am, sir, your obedient servant,

(Sgd.) T. S. GORE,

Land Commissioner.

MR. FRANK VICKER HOBBS,
Victoria.

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EXHIBIT "I."

(Referred to as Exhibit "F" in Examination Evidence before Trial.)

SMALL TRACING PREPARED BY MR. SOLLY, HANDED BY HIM TO
PLAINTIFF.

EXHIBIT "J."

20

(Referred to as Exhibit "I" in Examination Evidence before Trial.)

LETTER FROM L. H. SOLLY TO PLAINTIFF, DATED 2ND MARCH, 1896.

ESQUIMALT & NANAIMO RAILWAY CO.—LAND DEPARTMENT.

VICTORIA, B. C., March 2nd, 1896.

FRANK V. HOBBS, ESQ.,
Victoria, B. C.

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DEAR SIR:—I am instructed to inform you that the Railway Company are now prepared to issue a conveyance to you of the land you agreed to purchase in Douglas District, providing that within two months from this date you have the land surveyed, and the notes sent in to this office, and also pay up the overdue charges on the same, which are as below. Kindly send me a line in reply to say if this arrangement will suit you.

Re purchase of 160 acres in Douglas District:

Balance of purchase money	\$360 00	40
Six years' simple interest at 6 per cent	129 60	
Title fee	10 00	

\$499 60

Yours truly,

(Sgd.) LEONARD H. SOLLY,

Land Commissioner.

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EXHIBIT "K."

(Referred to as Exhibit "No. 1" in Examination Evidence before Trial.)

LETTER FROM PLAINTIFF TO LEONARD H. SOLLY, DATED 10TH
APRIL, 1896.

185 DOUGLAS ST., VICTORIA, B. C., 10th April, 1896.

LEONARD H. SOLLY, ESQ.,

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Land Commissioner.

DEAR SIR:—I beg to inform you that I have had the land surveyed in Cranberry and Douglas Districts and expect ere long Mr. Priest will send in the plan and field notes to your office. Will you kindly send me a line after you have received them and say if the survey is acceptable to the Company, so that I may call and complete the purchase.

Yours truly,

(Sgd.) FRANK VICKER HOBBS.

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EXHIBIT "L"

LETTER FROM L. H. SOLLY TO PLAINTIFF, DATED 11TH APRIL, 1896. 30

ESQUIMALT & NANAIMO RAILWAY COMPANY—LAND DEPARTMENT.

VICTORIA, B. C., April 11th, 1896.

F. V. HOBBS, ESQ.,

Victoria, B. C.

DEAR SIR:—I am in receipt of your letter of the 10th inst., re survey of your land in Douglas and Cranberry Districts

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In reply I beg to inform you that I have received the field notes from Mr. Priest, and that they are quite satisfactory.

A deed will be at once prepared on receipt of charges, as stated in my letter to you of March 2nd.

Yours truly,

(Sgd.) LEONARD H. SOLLY,

Land Comm'r.

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EXHIBIT "M."

(Referred to as Exhibit "No. 2" in Examination Evidence before Trial.)

LETTER FROM LEONARD H. SOLLY TO PLAINTIFF, DATED 27TH
APRIL, 1896.

ESQUIMALT & NANAIMO RAILWAY CO.—LAND DEPARTMENT.

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VICTORIA, B. C., April 27th, 1896.

F. V. HOBBS, Esq.,

Douglas St.

DEAR SIR:—Just a line to remind you that the two months' extension of time given you to complete the purchase of Lot 6, Douglas District, expires on Saturday next.

Yours truly,

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(Sgd.) LEONARD H. SOLLY,

Land Comm'r.

EXHIBIT "N."

(Referred to as "Exhibit No. 8" in Examination Evidence before Trial.)

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LETTER FROM PLAINTIFF TO LEONARD H. SOLLY, DATED 28TH
APRIL, 1896.

135 DOUGLAS STREET, VICTORIA, B. C., 28th April, 1896

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L. H. SOLLY, Esq.,

DEAR SIR:—I am in receipt of yours of yesterday and herewith I enclose a marked bank cheque for \$499.60, in full payment of purchase money for Lot 6, in Douglas and Cranberry Districts, as per my agreement with Mr. J. Trutch, dated 28th November, 1889, in accordance with which, please send me the deed as soon as possible, and oblige,

Yours truly,

(Sgd.) FRANK VICKER HOBBS.

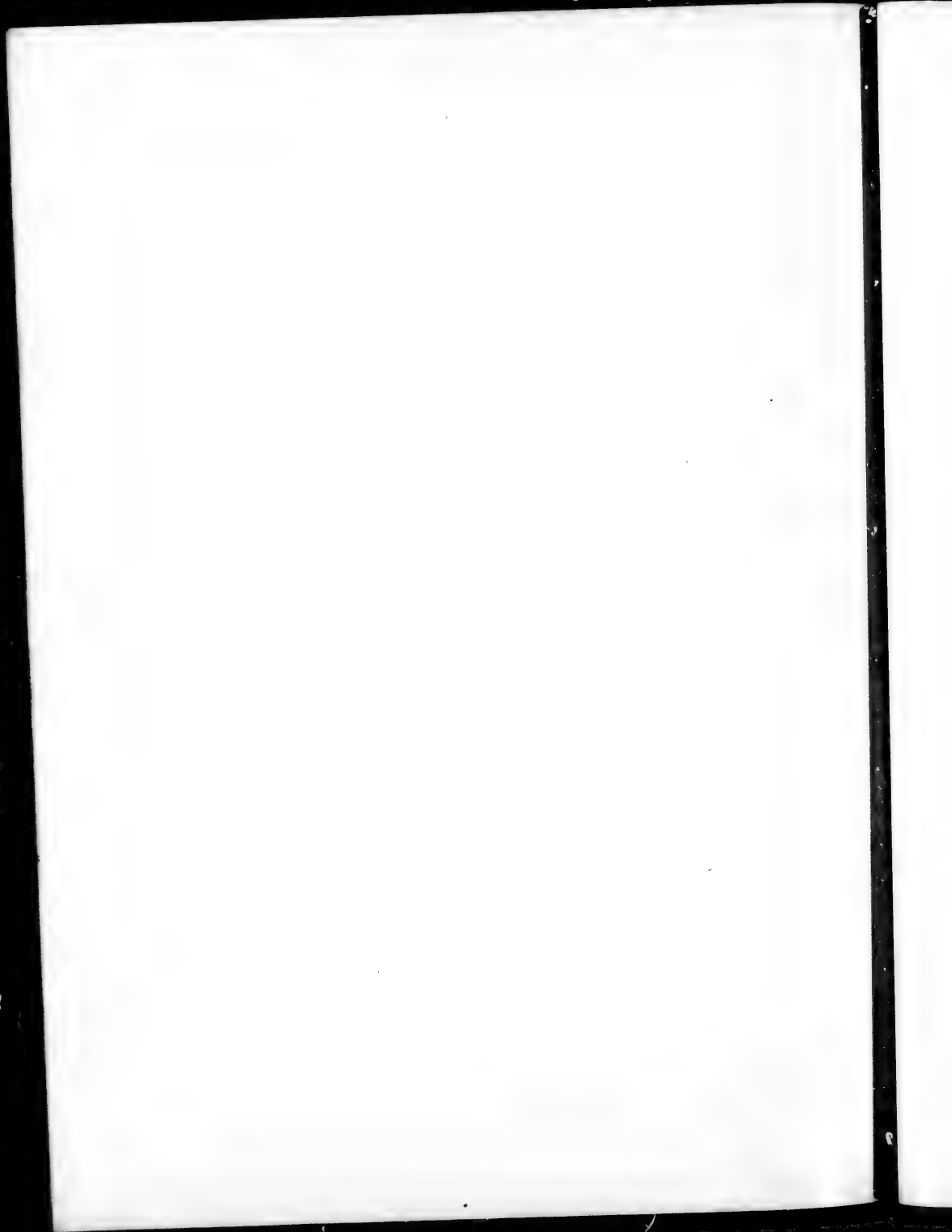


EXHIBIT "O."

CHEQUE MADE BY PLAINTIFF IN FAVOR OF DEFENDANTS, DATED
28TH APRIL, 1896, ENCLOSED IN EXHIBIT "N."

No. 27740.

VICTORIA, B. C., 28th April, 1896.

THE BANK OF BRITISH COLUMBIA.

VICTORIA, B. C.

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Pay to the E. & N. Railway Co. in full
payment of purchase money for Lot 6, Douglas District, four hundred and ninety-nine
and $\frac{60}{100}$ dollars, \$499.60.

(Sgd.) FRANK VICKER HOBBS.

ENDORSEMENT ON BACK OF THE ABOVE CHEQUE.

For deposit only; Bank of British Columbia, for credit of Esquimalt & Nanaimo
Railway Co.

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R. M. JEFFREY,

Cashier.

EXHIBIT "P."

(Referred to as Exhibit "No. 3" in Examination Evidence before Trial.)

LETTER FROM L. H. SOLLY TO PLAINTIFF, DATED 29TH APRIL, 1896.

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ESQUIMALT & NANAIMO RAILWAY CO.—LAND DEPARTMENT.

VICTORIA, B. C., April 29th, 1896.

FRANK VICKER HOBBS, ESQ.,

135 Douglas District.

DEAR SIR:—I am in receipt of your letter of the 28th inst., enclosing Cheque for
\$499.60. in payment of balance of charges on your purchase of Lot 6, Douglas District,
as per enclosed receipt.

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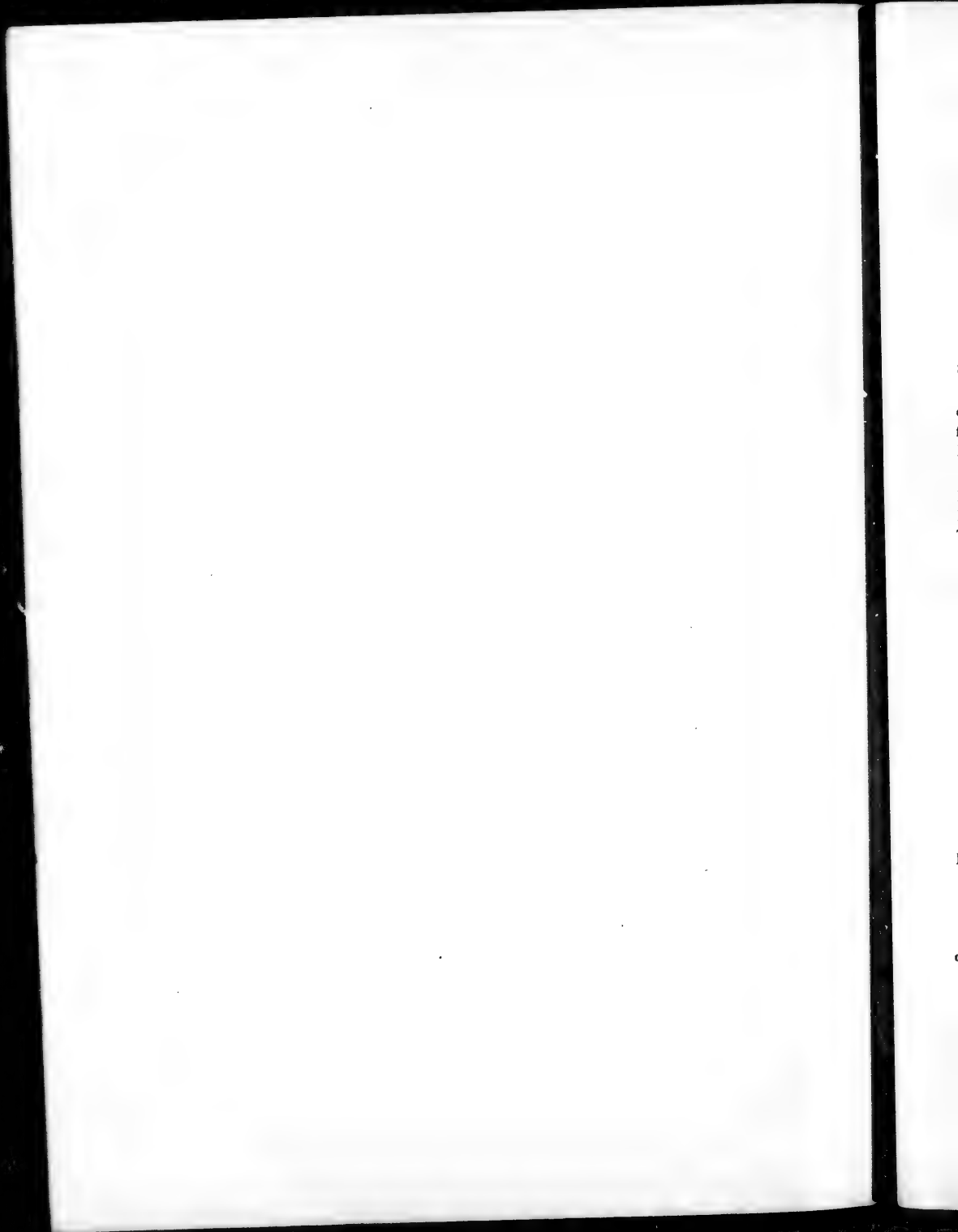
Your deed will be prepared at once, and signed as soon as Mr. Dunsmuir returns to
Victoria, which will be in about ten days.

When your deed is issued, I shall require the enclosed receipt, together with your
first receipt, returned to this office to be placed on file.

Yours truly,

(Sgd.) LEONARD H. SOLLY,

Land Comm'r.



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EXHIBIT "Q"

(Referred to as Exhibit "No. 4" in Examination Evidence before Trial.)

 RECEIPT FROM DEFENDANTS TO PLAINTIFF FOR BALANCE OF
 PURCHASE MONEY, VIZ., \$499 60 DATED 29TH APRIL, 1896.

ESQUIMALT & NANAIMO RAILWAY CO.—LAND DEPARTMENT.

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RECEIPT.

864.

Received from Frank Vicker Hobbs, Esq., the sum of four hundred and ninety-nine dollars and $\frac{60}{100}$, being the Bal., Int. and C. T. Fee, payment on account of his purchase from the E. & N. Ry. Co., of one hundred and sixty acres in Douglas and Cranberry Dists. Description, Lot 6.

Terms:

Balance.....	\$360 00
Interest.....	129 60 ²⁰
Title fee.....	10 00

\$499.60

(Sgd.) LEONARD H. SOLLY,

Land Commissioner.

Victoria, B. C., April 29th, 1896.

EXHIBIT "R."

(Referred to as Exhibit "No. 6" in Examination Evidence before Trial.)

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 LETTER FROM LEONARD H. SOLLY TO PLAINTIFF, DATED 8TH
 MAY, 1896.

ESQUIMALT & NANAIMO RAILWAY CO.—LAND DEPARTMENT.

VICTORIA, B. C., May 8th, 1896.

F. V. HOBBS, Esq.,

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Douglas St.

DEAR SIR:—Enclosed please find conveyance in your favor of Lot 6, Douglas District.

Kindly sign and return the enclosed receipt for the same, and also return the two receipts given you for payments.

Yours truly,

(Sgd.) LEONARD H. SOLLY,

Land Comm'r.

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EXHIBIT "S."

(Referred to as Exhibit "No. 5" in Examination Evidence before Trial)

MEMORANDUM OF RECEIPT FOR CONVEYANCE OF DEFENDANTS,
DATED 1ST MAY, 1896, ENCLOSED IN EXHIBIT "R."ESQUIMALT & NANAIMO RAILWAY CO.—LAND DEPARTMENT.
VICTORIA.

10

Date, May 1st, 1896.

SIR.—The accompanying conveyance of title in favour of Frank Vicker Hobbs, Number 302, Lot 6, Douglas, is forwarded to you for.....for which his receipt is requested opposite.

Place.....
Date.....
Received conveyance No. 302, Lot 6, Douglas District.

To.....

To the Land Commissioner of Esquimalt & Nanaimo Railway Company.

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EXHIBIT "T."

FORM OF CONVEYANCE, TENDERED BY DEFENDANT TO PLAINTIFF,
DATED 1ST MAY, 1896, ENCLOSED IN LETTER, EXHIBIT "R."

302.

This Indenture made this first day of May, A. D. one thousand eight hundred and ninety-six, between the Esquimalt & Nanaimo Railway Company of the one part and Frank Vicker Hobbs of the other part.

Witnesseth that in consideration of the sum of four hundred and eighty dollars paid by the said Frank Vicker Hobbs to the said Company, the receipt of which said sum of four hundred and eighty dollars the said Company do hereby and of and from the same and every part thereof, do hereby acquit and release the said Frank Vicker Hobbs, his heirs, executors and administrators. They the said Company do hereby grant and convey unto the said Frank Vicker Hobbs, his heirs and assigns, all that piece or parcel of 40 land situated in the District of Douglas, Vancouver Island, in the Province of British Columbia, and upon the Official Map of the said district, known and numbered as Lot 6, Douglas District aforesaid, and which said piece or parcel of land is said to contain one hundred and sixty acres more or less, and is more particularly shown upon the plan or tracing hereunto annexed and thereon coloured red.

To have and to hold the said land unto and to the use of the said Frank Vicker Hobbs, his heirs and assigns forever, subject nevertheless to the reservations hereinafter mentioned, that is to say:

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Saving and reserving to the said Company, their successors and assigns, and their agents, servants, contractors and workmen, the right to enter into and upon the said land, and cut and carry away any timber therefrom for railway purposes, without paying compensation therefor.

And saving and reserving also to the said Company, their successors and assigns, rights of way for their railway through the said land, and the right for themselves, their agents, servants, contractors and workmen to enter upon and take such parts of the said land as may be required for the stations and workshops of the said Company without paying compensation therefor. 10

And saving and reserving to the said Company, their successors and assigns, all coal, coal oil, ores, mines, minerals, and quarries whatsoever, in, or under the land hereby granted or expressed so to be, with full liberty of ingress, egress and regress at all times for the said Company, their successors and assigns, and their servants, agents and workmen, in, to and upon the said land, and either with or without railways, horses, or other cattle, carts, and wagons and other carriages for the purpose of searching for, working, getting and carrying away the said coal, coal oil, ores, mines, minerals and quarries, and with full liberty, also, for the said Company, their successors and assigns, and their servants, agents and workmen, to sink, drive, make and use pits, shafts, drifts, adits, 20 courses and water courses, and to erect and set up fire and other engines, machinery and works, and to open roads in, upon, under and over the said land, or any part or parts thereof, for the purpose of more conveniently working and carrying away the said mines, minerals and quarries, and also to appropriate and use any part of the surface of the said land for depositing, placing and heaping thereon the minerals, waste, rubbish and other substance which may be gotten from the said mines, minerals and quarries the Company, their successors and assigns, paying reasonable compensation for such of the surface of the said land as may be taken, damaged or destroyed by such searching, working, getting and carrying away. 30

And the said Company do hereby for themselves, their successors and assigns, covenant with the said Frank Vicker Hobbs, his heirs and assigns, that they have the power to grant and convey the said land in manner aforesaid, and that it shall be lawful for the said Frank Vicker Hobbs, his heirs and assigns, to enter upon and hold, occupy and enjoy the said lands for his or their use and benefit, subject to the reservations aforesaid.

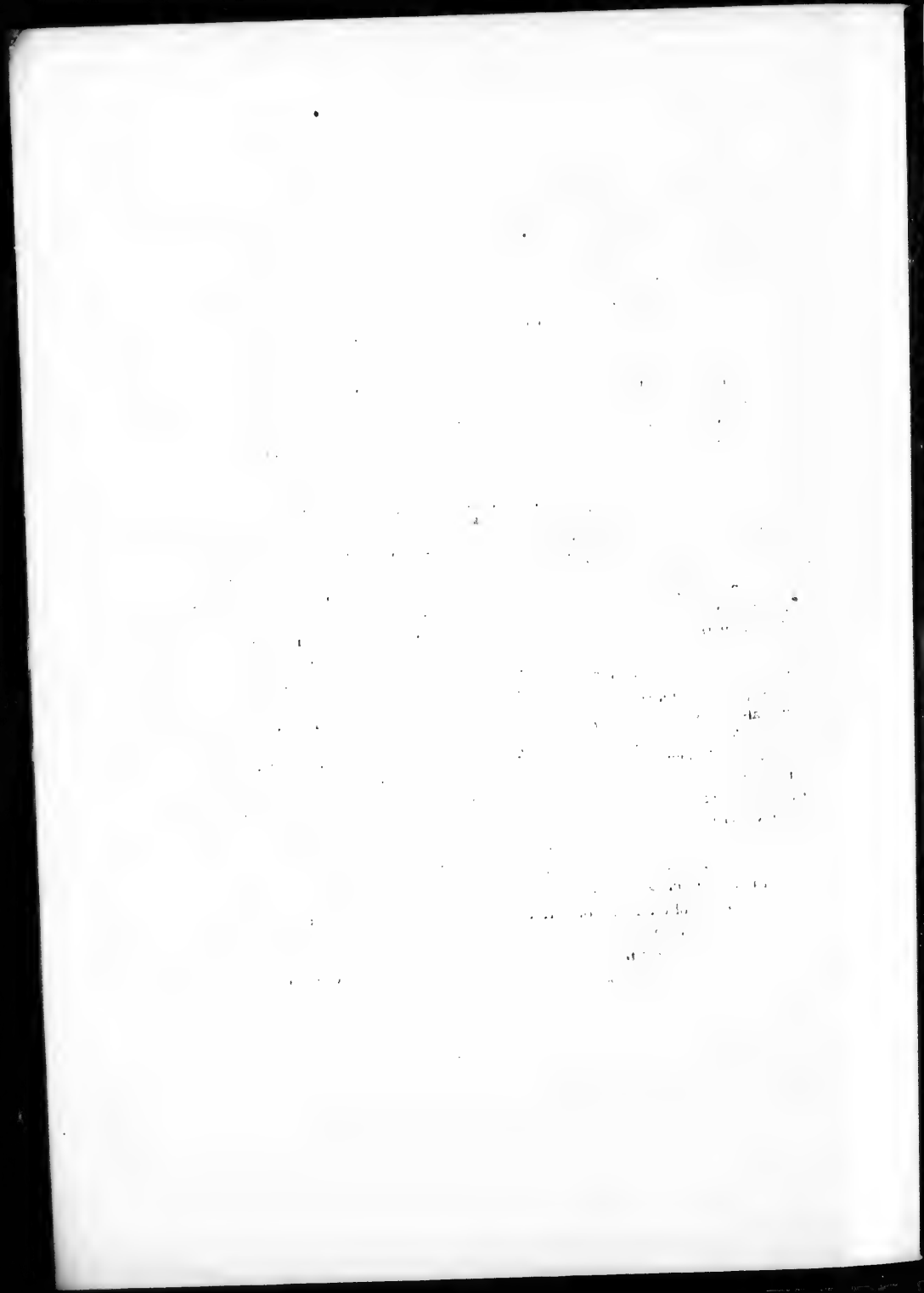
In witness whereof the common seal of the said Company has been hereunto affixed by order of the Board of Directors.

Scaled by order of the Board of Directors, made at a meeting held the nineteenth day 40 of January, 1889.

(Sgd.) JAMES DUNSMUIR,
Vice President

(Sgd.) CHAS. E. POOLEY,
Secretary.

.....
Common Seal of
Company.
.....



ACKNOWLEDGMENT.

I hereby certify that Charles Edward Pooley, personally known to me, appeared before me and acknowledged to me that he is the person who subscribed his name to the annexed Instrument, as Secretary of the said Esquimalt & Nanaimo Railway Company, and affixed the seal of the said Esquimalt & Nanaimo Railway Company to the said Instrument, that he was first duly authorized to subscribe his name as aforesaid, and to affix the said seal to the said instrument.

In testimony whereof, I have hereunto set my hand and seal of office, at Victoria, British Columbia, this eighth day of May, A. D. 1896. 10

.....
Seal.
.....

(Sgd.) H. MAURICE HILLS,

Notary Public, B. C.

EXHIBIT "U."

(Referred to as Exhibit "No. 7" in Examination Evidence before Trial.)

LETTER FROM PLAINTIFF TO LEONARD H. SOLLY, DATED 9TH
MAY, 1896. 20

135 DOUGLAS ST., VICTORIA, B. C., 9th May, 1896.

L. H. SOLLY, ESQ.,

DEAR SIR:—I herewith return you the deed you sent me this morning; it is not acceptable to me, being full of reservations.

When I purchased the land from Mr. J. Trutch (acting for the Company) there were ³⁰ no reservations either expressed or implied, my original agreement calls for none, and I again demand a clear deed in accordance with that agreement.

I remain, yours truly,

(Sgd.) F. V. HOBBS.

EXHIBIT "V."

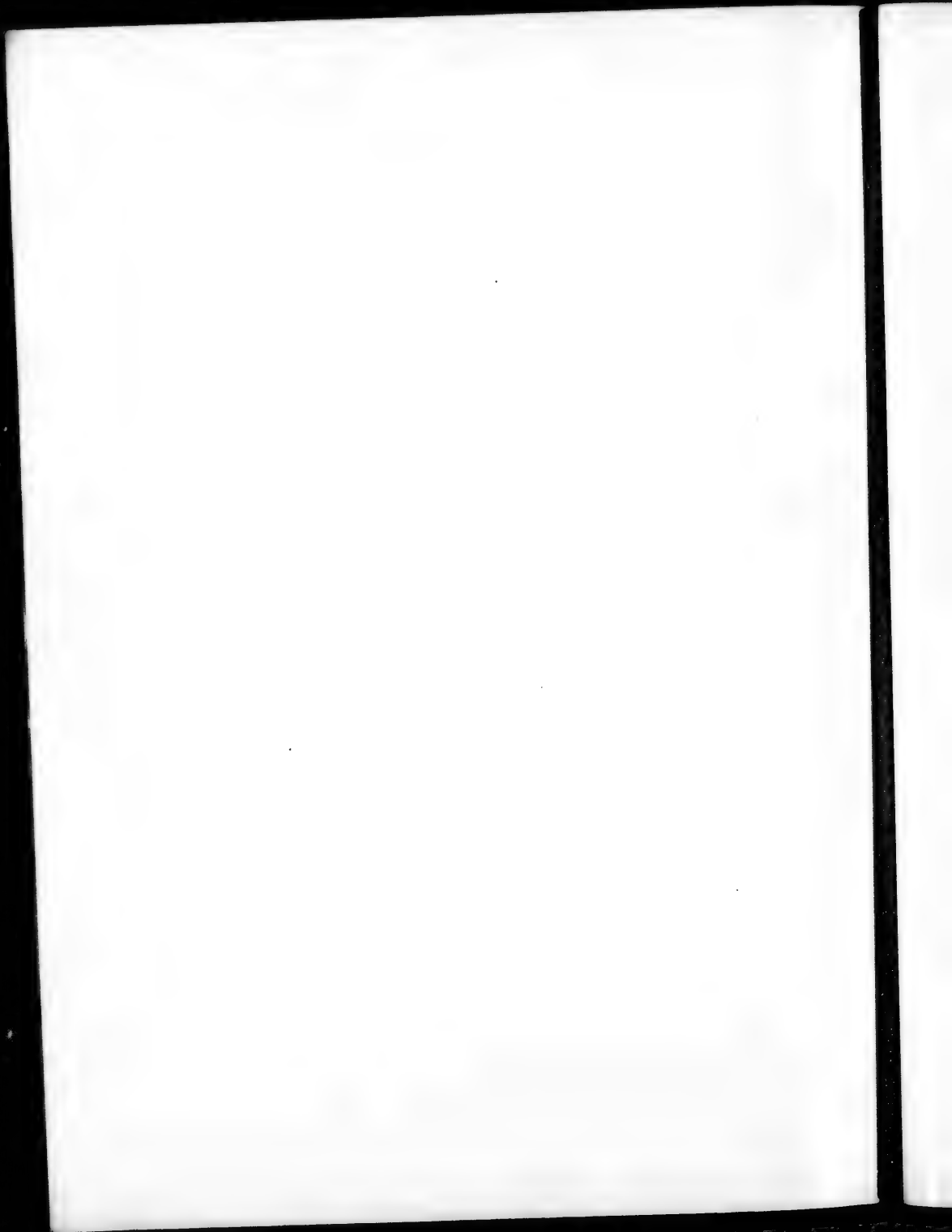
LETTER FROM LEONARD H. SOLLY TO PLAINTIFF, DATED 3RD
SEPTEMBER, 1896. 40

September 3rd, 1896.

FRANK VICKER HOBBS, ESQ.,

Victoria, B. C.

DEAR SIR:—Enclosed please find cheque in your favor for \$610.00, being the refund



of all moneys paid by you on the purchase of Lot 6, Douglas Dist., conveyance for which you refused to accept from the Company.

Yours truly,

(Sgd.) LEONARD H. SOLLY,

Land Comm'r.

EXHIBIT "W."

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CHEQUE OF DEFENDANTS IN FAVOUR OF PLAINTIFF, FOR \$619.60,
DATED 3RD SEPTEMBER, 1896, ENCLOSED IN EXHIBIT "V."

THE ESQUIMALT & NANAIMO RAILWAY COMPANY.

Office, Victoria, B. C.

VICTORIA, B. C., 3rd Sept., 1896.

\$619.60.

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BANK OF BRITISH COLUMBIA.

Pay to Mr. Frank Vicker Hobbs, or order, (\$619.60) six hundred and nineteen $\frac{60}{100}$ dollars.

No. 5864.

(Sgd.) JAS. DUNSMUIR,

Vice President.

(No Endorsement on Same.)

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EXHIBIT "X"

DEED TENDERED BY PLAINTIFF TO DEFENDANTS, DATED DECEMBER, 1896.

This Indenture, made this..... day of December, A. D. one thousand eight hundred and ninety-six, between the Esquimalt & Nanaimo Railway Company of⁴⁰ the one part and Frank Vicker Hobbs, of the City of Victoria, in the Province of British Columbia, of the other part; witnesseth that in consideration of the sum of six hundred and nine dollars and sixty cents, paid by the said Frank Vicker Hobbs to the said Company, the receipt of which said sum of six hundred and nine dollars and sixty cents the said Company do hereby acknowledge, and of and from the same and every part thereof do hereby acquit and release the same Frank Vicker Hobbs, his heirs, executors and administrators, they, the said Company, do hereby grant and convey unto the said Frank Vicker Hobbs, his heirs and assigns, all that piece or parcel of land situate in Douglas and

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OFFICE

Cranberry Districts, Vancouver Island, in the said Province, being part of Lot 6, Douglas District, and Lots 10 and 11, Cranberry District, and more particularly described as follows: Commencing at a post situate 20 chains due north and 3 chains due west of the northeast corner post of Lot 3, Douglas District, thence due east 40 chains, thence due north 40 chains, thence due west 40 chains, thence due south 40 chains and 23 links, more or less, to the place of commencement, containing by admeasurement 160 acres more or less, together with all buildings, fixtures, commons, ways, profits, privileges, rights, easements and appurtenances to the said hereditaments belonging or with the same or any part thereof held or enjoyed or appurtenant thereto, and all the estate, right, title, interest, 10 property, claim and demand of the said Company in, to or upon the said premises. To have and to hold all the said premises expressed to be hereby granted unto and to the use of the said Frank Vicker Hobbs forever; subject, nevertheless, to the reservations, limitations, provisos and conditions expressed in the original grant thereof from the Crown.

In witness whereof the common seal of the said Company has been hereunto affixed by order of the Board of Directors.

Sealed by Order of the Board of Directors, made at a meeting held the day of 18..

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EXHIBIT "Y."

FIELD NOTES MADE BY MR. E. PRIEST, PROVINCIAL LAND SURVEYOR OF THE LAND CLAIMED BY PLAINTIFF.

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EXHIBIT "Z."

PLAN PREPARED BY MR. WILLIAM G. PINDER.

EXHIBIT "NO. 1."

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OFFICIAL MAP OF CRANBERRY DISTRICT, 1859, OF DEFENDANTS.

EXHIBIT "NO. 2."

DEFENDANTS' REGISTER OF DOUGLAS DISTRICT.

EXHIBIT "NO. 3"

PLAN OF DOUGLAS DISTRICT OF DEFENDANTS.

EXHIBIT "NO. 4."

CORRESPONDENCE BETWEEN HUNTER & DUFF, ACTING FOR THE 10
PLAINTIFF, AND THE DEFENDANTS.LETTER FROM HUNTER & DUFF TO DEFENDANTS, DATED 9TH
DECEMBER, 1895.

VICTORIA, B. C., 9th December, 1895.

THE LAND COMMISSIONER E. & N. RAILWAY CO.,

Victoria.

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DEAR SIR:—We have been instructed by Mr Frank Vicker Hobbs to take proceedings to obtain specific performance of an agreement between Mr. Hobbs and the E. & N. Railway Company for the purchase and sale of 160 acres of land in the Bright District described as follows: Commencing at a point about two (2) miles west of Louis Stark's Crown Grant in Cranberry District, thence running west 40 chains to Berkeley Creek, thence south 40 chains, thence east 40 chains, thence north 40 chains, to place of commencement.

We are instructed by Mr. Hobbs that he a short time ago tendered to you the balance³⁰ of the purchase money under his agreement and that you declined to accept the same. Will you kindly state to us whether the Company is willing to waive formal tender of the balance of the purchase money and a tender of conveyance of the land, and if not would you kindly mention the time that would be convenient to yourself and the President of the Company to receive tender of same. An early reply will oblige.

Yours truly,

(Sgd.) HUNTER & DUFF.

LETTER FROM LEONARD H. SOLLY TO HUNTER & DUFF, DATED⁴⁰
10TH DECEMBER, 1895.

December 10th, 1895.

MESSRS. HUNTER & DUFF,

Victoria, B. C.

DEAR SIR:—I am in receipt of your letter of the 9th inst., re Mr. F. V. Hobbs and land claimed by him in Bright District. In reply I beg to inform you that the Vice

President, Mr. Dunsmuir, is at present absent from Victoria and will not return before the end of the week, but that as I think it possible that a tender of the balance of the purchase money might now be accepted, I shall be obliged if you will allow the matter to rest till his return, when I will at once communicate to you his decision.

Yours truly,

(Sgd.) LEONARD H. SOLLY,

Land Comm'r.

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LETTER FROM LEONARD H. SOLLY TO HUNTER & DUFF, DATED
12TH DECEMBER, 1895.

DEAR SIR:—I am instructed to inform you that the Esquimalt & Nanaimo Ry. Co. are prepared to refund Mr. Frank Vicker Hobbs \$120.00, paid by him as a first payment on account of his purchase of 160 acres of land in Bright District, on November 28th, 1889, but that as Mr. Hobbs neither paid his instalments or interest as they became due, they²⁰ are not prepared to accept the balance of the purchase money and issue a conveyance to the land.

Yours truly,

(Sgd.) LEONARD H. SOLLY,

Land Comm'r.

P. S.:—Quite willing to waive formal tender of balance, &c.

L. H. S.

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LETTER FROM HUNTER & DUFF TO LEONARD H. SOLLY, DATED
23RD DECEMBER, 1895.

VICTORIA, B. C., 23rd December, 1895.

L. H. SOLLY, ESQ.,

Land Commissioner,

E. & N. Railway Company,

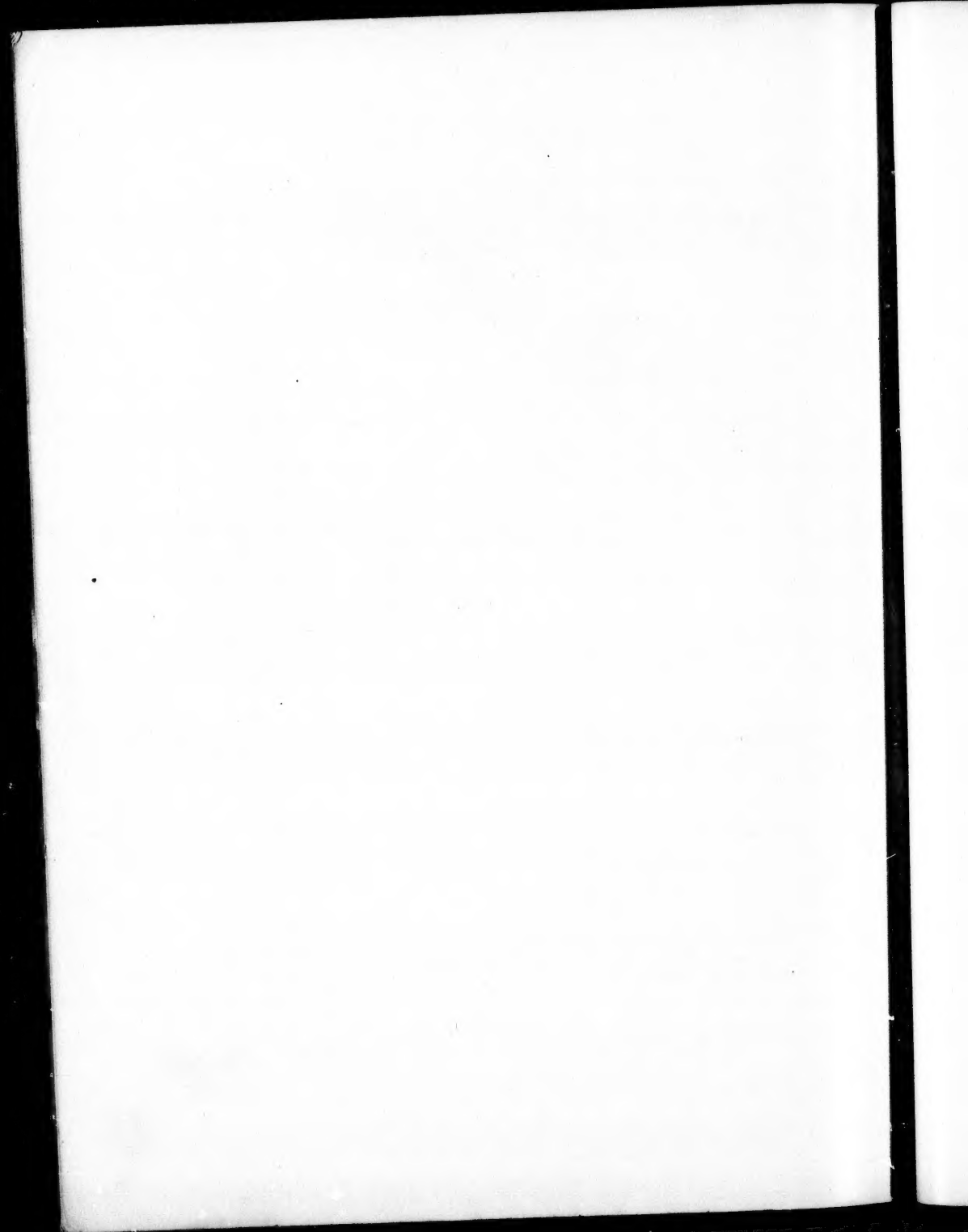
Re Hobbs.

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DEAR SIR:—We beg to acknowledge the receipt of your favour of the 12th instant, informing us that the Company is prepared to waive formal tender of the balance of the purchase money. Will you kindly also state that you will dispense with formal tender of conveyance.

Yours truly,

(Sgd.) HUNTER & DUFF.



LETTER FROM HUNTER & DUFF TO LEONARD H. SOLLY, DATED
30TH JANUARY, 1896.

VICTORIA, B. C., 30th January, 1896.

L. H. SOLLY, ESQ.,

Land Commissioner, E. & N. Railway Co.,
Victoria.

Re Hobbs.

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DEAR SIR:—We wrote you on the 23rd December last, asking you to state whether the Company was prepared to dispense with formal tender of conveyance herein, to which we have received no reply. Will you please let us hear from you on the matter.

Yours truly,

(Sgd.) HUNTER & DUFF,

LETTER FROM LEONARD H. SOLLY TO HUNTER & DUFF, DATED 20
31ST JANUARY, 1896.

January 31st, 1896.

MESSRS. HUNTER & DUFF,

Victoria, B. C.

Re Hobbs.

DEAR SIRS:—I am in receipt of your letter of the 30th instant. Your letter of December 23rd was duly received by me and placed before Mr. James Dunsmuir, Vice President of the Company, who informed me that I need not reply to it, as he was about to place the matter in the hands of the Company's Solicitor, so that I considered the matter out of my hands.

Mr. Dunsmuir is at present absent from Victoria, but your letter will be placed before him on his return.

Yours truly,

(Sgd.) LEONARD H. SOLLY.

LETTER FROM HUNTER & DUFF TO LEONARD H. SOLLY, DATED 40
3RD SEPTEMBER, 1886.

VICTORIA, B. C., 3rd September, 1896.

L. H. SOLLY, ESQ.,

Land Commissioner, E. & N. Ry. Co.,
Victoria.

DEAR SIR:—Herewith we enclose cheque of the Esquimalt & Nanaimo Railway

Company for the sum of \$619.60, enclosed by you in letter dated to-day to Mr. Frank Vicker Hobbs.

We have to say that Mr. Hobbs has not refused to accept a conveyance from the Company of the land purchased by him from the Company. He has been always willing and is now willing to accept from the Company a conveyance in accordance with his agreement, but he has declined to accept any conveyance of the lands purchased containing any reservations or exceptions, which are not provided for in the agreement of purchase.

Yours Truly.

(Sgd.) HUNTER & DUFF.

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Deliver.